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In the Supreme Court of the United States

October Term, 1984

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY,
FRED R. CREAGER & SONS, INC.,
MATCO, INC.,
OAMCO, INC.,
C. P. CALAWAY, INC.,
THE MAUMEE STONE COMPANY,
THE MICHIGAN STONE COMPANY,
WOLCOTTVILLE SAND & GRAVEL CORP. and
J. T. KIRKBY,
Petitioners,

vs.

ARTHUR S. LANGENDERFER, INC. and
NORTHERN OHIO ASPHALT PAVING CO.,
Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

This Court has never had a case like this one. It is a private antitrust case. Four federal judges have wrestled with it, over a period of eight years, and then divided two to two, over the questions the case brings here for review, as follows:

(1) Whether, as a matter of law, the doctrine of "predatory pricing" can ever apply under Sections 1 and 2 of the Sherman Act to bids submitted to public authority under statutorily required competitive bidding, when the challenged bids, considered individually or collectively, cover all costs and yield a profit.

(2) Whether antitrust laws lay any obligation on the bidder in such case to "maximize profit."

(3) Whether there is any obligation under antitrust laws in such case to bid high enough so as not to "leave money on the table."

(4) Whether in such case it is a violation of antitrust law to submit a bid that is below the costs of competitors.

(5) Whether it is a violation of Section 7 of the Clayton Act to diversify by acquiring other companies, where all 12 challenged acquisitions over a period of 19 years, except only the last one (which did not occur until a year after the complaining competitor had gone out of business) are held not to violate the statute.

(6) Whether it is a departure from the accepted and usual course of judicial proceedings to remand for new trial, instead of entering final judgment for defendants, where:

(a) *on the Sherman Act claim* on which both courts below found the evidence focused on "predatory pricing," the Court of Appeals held the trial court erred in refusing to direct a verdict on that issue for defendants;

(b) *on the Clayton Act claim* the Court of Appeals held the trial court erred in refusing to direct a verdict for defendants on all 12 acquisitions, except only the last, which was in no way a violation of the statute, and could not have injured plaintiff since it did not occur until after plaintiff had gone out of business.

When four judges divide two to two on these questions antitrust law is in a parlous state.

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RULE 28 STATEMENT

All parent companies, subsidiaries and affiliates of Petitioners are named in the caption.

RECORD REFERENCES

(A-1) refers to the printed Appendix in the Court of Appeals.

(App.1) refers to the Appendix to this Petition for Certiorari.

No.

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October Term, 1984

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY,
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Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

Petitioners above named move the Court to issue its writ of certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this private antitrust case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, reported in 729 F.2d 1050, is reproduced in the Appendix hereto. (App.1.)

The opinions of the United States District Court for the Northern District of Ohio, Western Division, are unreported. The District Court's opinion denying Petitioners' Motion for Judgment n.o.v. is reproduced in the Appendix hereto. (App.27.)

JURISDICTION TO REVIEW

The judgment in the Court of Appeals is dated, and was entered March 15, 1984 (App.36); rehearing sought by Respondents was denied July 3, 1984. (App.37.)

This Court has jurisdiction to review under 28 U.S.C. §1254 upon petition for certiorari filed pursuant to 28 U.S.C. §2101(c).

STATUTES INVOLVED

The statutes involved, reproduced in the Appendix, are:

Sherman Act §*1*, 15 U.S.C. §1 (1975) which says:
"Every contract, combination * * * or conspiracy in restraint of trade * * * is * * * illegal * * *."

Sherman Act §*2*, 15 U.S.C. §2 (1974) which says:
"Every person who shall monopolize or attempt to monopolize or combine or conspire with any

other person * * * to monopolize any part of the trade or commerce * * * shall be deemed guilty * * *."

Clayton Act §7, 15 U.S.C. §18 (1950) which says: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or * * * the whole or any part of the assets of another corporation engaged also in commerce, where * * * the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

* * *

This section shall not * * * prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof * * *."

STATEMENT OF THE CASE

This antitrust case concerns only contracts let by public bidding by the Ohio Turnpike Commission for paving and repairs on the Ohio Turnpike and by the Ohio Department of Transportation for like work on Ohio roads. All else is excluded.

The geographic area involved and the relevant market (as alleged by plaintiff Langenderfer and stipulated for the purposes of this appeal) consisted of such contracts let by the Ohio Turnpike Commission and by the Ohio Department of Transportation in 13 counties in Northwestern Ohio. 729 F.2d at 1053.

—The Parties

Petitioners named in the caption, collectively referred to as "Johnson," are the S. E. Johnson Company, founded in 1929, to engage in highway paving and like work, and its subsidiaries and affiliated concerns, and its President, as follows, 729 F.2d at 1053:

> The Ohio Engineering Company, Fred R. Creager & Sons, Inc., and C. P. Calaway, Inc., wholly owned contracting subsidiaries of Johnson;
>
> Matco, Inc. and Oamco, Inc., affiliated asphalt producers for Johnson and Ohio Engineering;
>
> The Maumee Stone Company and The Michigan Stone Company, operators of limestone quarries;
>
> Wolcottville Sand & Gravel Corp., which formerly operated sand pits; and
>
> J. T. Kirkby who succeeded Sherman E. Johnson as President in 1956. (A-981-982.)

Respondents named in the caption, collectively referred to as "Langenderfer," are Arthur S. Langenderfer, Inc. and its affiliate, Northern Ohio Asphalt Paving Co.

—The Violations Alleged

Johnson was assailed by its competitor, Langenderfer, for antitrust violation. Langenderfer charged Johnson:

(1) *violated Sections 1 and 2 of the Sherman Act.* The charge was that Johnson combined and conspired to drive Langenderfer out of business "by monopolistic and anticompetitive practices" in bidding for the jobs in question. 729 F.2d at 1052. Langenderfer claimed Johnson, in submitting statutorily required competitive bids, did not bid high

enough; it submitted bids "at unreasonably low figures." (A-23, 128, 131, 279.) The Court of Appeals found Johnson "never bid below its own cost," and "consistently made a profit on those successfully bid state highway and turnpike projects." 729 F.2d at 1055, 1056. Langenderfer's claim "at trial (and on this appeal) was that defendants intentionally and consistently bid below the cost level of smaller competitors" and at so low a figure that it "left money on the table." This, according to Langenderfer, was "predatory pricing" since Johnson "could have submitted higher bids and still have won the paving contracts * * *." 729 F.2d at 1056.

(2) *violated Section 7 of the Clayton Act* by making 12 diversifying acquisitions over a period of 19 years. The Court of Appeals held the trial court should have directed a verdict for Johnson "as to all of the acquisitions" except only the last one—the Union Quarries acquisition, which was in no way in violation of the statute. The Union Quarries acquisition could not have damaged Langenderfer for two reasons: (a) the acquisition occurred a year after Langenderfer went out of business, and (b) since Langenderfer measured damages, not by the contracts it lost, but by the contracts it won, it could not have been damaged by the acquisition because Langenderfer had long ceased bidding on such contracts.

—The Result Below

The trial in the Northern District of Ohio, Western Division, before Judge Don J. Young and a jury (pursuant

to jurisdiction granted by 28 U.S.C. §1331), resulted in a verdict of $982,117. The District Court trebled this to $2,946,351 and added attorneys' fees of $344,544 and costs of $18,559 for a total judgment of $3,309,454, plus interest (at 6% from April 2, 1980, to July 30, 1980, and at 8% thereafter). As of July 30, 1984, this would amount to $4,434,068.36.

The Court of Appeals for the Sixth Circuit (Circuit Judges Lively and Wellford and District Judge Wilhoit, sitting by designation) reversed, with District Judge Wilhoit dissenting. The Court of Appeals held the trial court should have directed a verdict in favor of Johnson on the "predatory pricing" claim and on all Clayton Act acquisitions but one—the last one. The trial court held:

> "the major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding."

Other practices alleged against Johnson, the trial court held, 729 F.2d at 1055:

> "were not specifically proved, however, by evidence at trial."

The Court of Appeals agreed "Support for the allegations of other types of anticompetitive conduct was meager at best," and, 729 F.2d at 1055, found:

> "the evidence presented at trial clearly focused on the claim of predatory pricing."

—The Complaint Here

In view of the concurrent findings of both courts below on the Sherman Act claim, and, since the Clayton Act was not violated, the Court of Appeals should have entered

final judgment in favor of Johnson. To refuse to enter final judgment under these circumstances will only:

(1) Further clutter crowded dockets with a meritless lawsuit.

(2) Lodge in the antitrust law the notion that, in statutorily required public bidding, it is unlawful to offer goods and services at a price that covers all costs and yields a profit, but which is lower than it need be to obtain the business. Never before has the cry been heard that alleged monopoly has made prices—not too high—but, as here, *too low.*

(3) Destroy the basis for public competitive bidding required, as in this case, by statute. Ohio Revised Code, Chapters 5525 and 5537. Public contracts generally everywhere must be let by competitive public bidding.*

**In Ohio,* for example, the statutes require contracts to be let to the *"lowest and best bidder"* for work on regional airports, R.C. §308.13; on air quality projects, R.C. §3706.04(k)(l); on public works, R.C. §123.15; on sanitary districts, R.C. §6115.20; on water projects, R.C. §6121.04(L)(1), and many others.

Federal statutes require that contracts made by the Defense Department for public works, buildings, vessels, aircraft and the like go to the *"lowest responsible bidder."* 10 U.S.C. §2304(a). Federal expenditures for highway construction and repair must be awarded by *"competitive bidding,"* 23 U.S.C. §112(B)(a), and all expenditures by executive agencies must be let "to that *responsible bidder* whose bid * * * will be most advantageous to the Government." C.F.R. §1-2.407-1 pursuant to 41 U.S.C. §28.

REASONS FOR REVIEW

This Court should review this case because—

I. CASE IS REVIEWABLE NOTWITHSTANDING REMAND FOR NEW TRIAL—THE CHALLENGED JUDGMENT IS THE EQUIVALENT OF A "FINAL" JUDGMENT

The reason is: *Nothing remains to be tried.*

In view of the findings, all that remains is to apply the law to those findings. When that is done, the result is the end of this case.

This will restore antitrust law and public bidding statutes to the purposes they were intended to serve. It will cut off soaring expenses—which in amounts already incurred are mind boggling. Additionally, decision now will relieve the judicial system from a drain it does not deserve.

To be sure, this Court ordinarily will deny review where a new trial awaits. However, this is not an inflexible rule. As Justice Black, speaking of the District Court's ruling striking from the Complaint, pointed out in *Gillespie v. United States Steel Corporation* (1964), 379 U.S. 148:

> "a decision 'final' * * * does not necessarily mean the last order possible to be made in the case." 379 U.S. at 152.

To the contrary,

> "the requirement of finality is to be given a 'practical rather than a technical construction.'" 379 U.S. at 152.

Here, as in *Gillespie*, decision on the issues presented is "'fundamental to the further conduct of the case,'" 379 U.S. at 152, and the ultimate costs "will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." 379 U.S. at 153.

The *Gillespie* case is in line with this Court's decisions under like circumstances, as is shown by:

Cox Broadcasting Corp. v. Cohn (1975), 420 U.S. 469, 476-487;

Eisen v. Carlisle & Jacquelin (1974), 417 U.S. 156, 170-172;

Bradley v. School Board of the City of Richmond (1974), 416 U.S. 696, 721-724;

Brown Shoe Co., Inc. v. United States (1962), 370 U.S. 294, 306-311;

Land v. Dollar (1947), 330 U.S. 731, 734 Note 2;

Swift & Company Packers v. Compania Colombiana Del Caribe (1950), 339 U.S. 684, 688-689;

Dickinson v. Petroleum Conversion Corp. (1950), 338 U.S. 507, 511-520;

Larson v. Domestic and Foreign Commerce Corp. (1949), 337 U.S. 682, 685 Note 3;

Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U.S. 541, 545-547;

United States v. General Motors Corp. (1945), 323 U.S. 373, 377.

The Court in *Gillespie* noted the considerations that control decision. The discussion is so relevant that, despite its length, it merits quotation here, as follows:

"Under § 1291 an appeal may be taken from any 'final' order of a district court. But as this Court often

has pointed out, a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545. And our cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U. S., at 546. See also *Brown Shoe Co. v. United States,* 370 U. S. 294, 306; *Bronson v. Railroad Co.,* 2 Black 524, 531; *Forgay v. Conrad,* 6 How. 201, 203. *Dickinson v. Petroleum Conversion Corp.,* 338 U. S. 507, 511, pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be

less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. And while their claims are not formally severable so as to make the court's order unquestionably appealable as to them, cf. *Dickinson v. Petroleum Conversion Corp., supra,* there certainly is ample reason to view their claims as severable in deciding the issue of finality, particularly since the brother and sisters were separate parties in the petition for extraordinary relief. Cf. *Swift & Co. Packers v. Compania Colombiana Del Caribe, S. A.,* 339 U. S. 684, 688-689; *Gumbel v. Pitkin,* 113 U. S. 545, 548. Furthermore, in *United States v. General Motors Corp.,* 323 U. S. 373, 377, this Court contrary to its usual practice reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the ruling was 'fundamental to the further conduct of the case.' For these same reasons this Court reviewed such a ruling in *Land v. Dollar,* 330 U. S. 731, 734, n. 2, and *Larson v. Domestic & Foreign Commerce Corp.,* 337 U. S. 682, 685, n. 3, where, as here, the case had not yet been fully tried. And see *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U. S., at 545-547. We think that the questions presented here are equally 'fundamental to the further conduct of the case.' It is true that if the District Judge had certified the case to the Court of Appeals under 28 U. S. C. § 1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circum-

stances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292 (b) by treating this obviously marginal case as final and appealable under 28 U. S. C. § 1291 (1958 ed.). We therefore proceed to consider the correctness of the Court of Appeals' judgment." 379 U. S. at 152-154.

Especially is it important that review be granted, where, as here, the case has been fully tried, comes with the facts found, nothing remains to be tried, and the questions presented, once decided, will restore meaning to the antitrust law and to statutes calling for competitive bidding on public contracts.

II. THE COURT SHOULD HOLD, AS A MATTER OF LAW, THAT IN ANTITRUST LAW, THE "PREDATORY PRICING" PRINCIPLE CAN NEVER APPLY TO STATUTORILY REQUIRED PUBLIC COMPETITIVE BIDDING WHERE THE CHALLENGED BIDS COVER ALL COSTS AND YIELD A PROFIT

It is a contradiction in terms to charge "predatory pricing" in statutorily required competitive public bidding under the circumstances of this case.

In pursuit of the spurious theory of "predatory pricing," Langenderfer has usurped the energies of the judicial system in a month-long trial (from March 3, 1980, to April 2, 1980), and appeals thereafter—at tremendous cost to heavily-laden dockets.

Langenderfer has incurred attorneys' fees in the sum of $548,763 (as claimed by Langenderfer's counsel in applying for allowance of fees) and has laid out $102,451.64 in expenses (see District Court's Opinion of January 22, 1981)

amounting, as of May 31, 1980, to $651,214.64 (with four or more years of appeals to go). This recalls Voltaire's experience: he said he had been ruined twice in his life—first, when he lost a lawsuit, and second, when he won one.

Of this staggering sum the trial court ordered Johnson to pay $363,103.

The litigation has imposed a like burden of attorneys' fees and expenses on Johnson.

Antitrust law cannot thrive on such abuse of the judicial process.

What Langenderfer charges, and to which it has bent every piece of evidence it could lay its hands on, is that Johnson ran afoul of the Sherman Act because:

(1) Johnson submitted "unreasonably low" bids to public authorities.

(2) Johnson failed to "maximize profit" on its public bids, a charge itself ridiculous in view of Langenderfer's assertion that "Johnson could have submitted higher bids and still won the paving contracts * * *. 729 F.2d at 1056."

(3) Johnson submitted bids that were less than Langenderfer's costs, thereby shutting Langenderfer out of the market. 729 F.2d at 1056. The bids are secret. No one knows who will be low bidder until the bids are publicly opened. How a bidder is to keep its bids greater than the costs of competitors, Langenderfer does not explain.

Bidding is a hazardous and endangered occupation. Many things can destroy estimates. That is one reason why bankruptcies in the building industry account for a large percentage of all bankruptcies, (*i.e.*, in 1983, more than 16% of all bankruptcies, Dunn & Bradstreet estimates.) As re-

ported in the *Dunn & Bradstreet Business Failure Record* (p. 3) "construction concerns had the strongest rise in failures * * *." In 1981, the last full year for which figures are available, there were 3,514 failures in the construction industry, (*i.e.*, more than 21% of *all* bankruptcies) with liabilities of $851,780,000. (*Id.* p. 9.)

Especially is it a contradiction in terms to speak of "predatory pricing" in a case of public bidding. The object is to obtain for the public the best price. Public bidding statutes cannot survive if the bidder must give—not its best and lowest price—but its highest, in order, as the dissenting judge in the Court of Appeals thought, to "maximize profit." 729 F.2d at 1061.

The moment it appeared that Langenderfer's theory of Sherman Act liability turned on its claim of "predatory pricing," the trial court, in view of its finding that Langenderfer's other claims of antitrust violation "were not specifically proven by evidence at trial," should have dismissed the case out of hand.

Damage to antitrust law from Langenderfer's "predatory pricing" theory calls for this Court's attention. Langenderfer's "predatory pricing" theory, applied to statutorily required public bidding, has gained an aura of respectability—and therefore calls for this Court's attention, since:

(1) two district judges (the trial judge and the dissenting judge in the Court of Appeals) have embraced Langenderfer's theory as Sherman Act law, and

(2) The Court of Appeals, instead of rejecting the "predatory pricing" claim out of hand as nonsense, and inapplicable in a case such as this, rejected the claim only after examining and analyzing it as if it were a legitimate one under the antitrust law and under statutorily required public bidding.

This Court should scotch any such notion as a basis for liability, before it takes root and erodes both the Sherman Act and competitive public bidding. This Court should put its thumb in the dike to stem the flood of like claims this case, if left outstanding, will let loose.

III. CLAYTON ACT ALSO NEEDS THE COURT'S ATTENTION

Langenderfer went out of business in 1978. 729 F.2d at 1053. It discontinued bidding on these contracts in 1978 and sold its paving equipment. (A-13, 54, 120, 129.)

The business died by its own hand.

The Court of Appeals explained:

> "Langenderfer did not diversity its operations, but remained an asphalt paving specialist." 729 F.2d at 1053.

By contrast, Johnson diversified its operations from the beginning. It started business in 1929 as a highway contractor, including asphalt paving. (A-981, 992-994.) It organized The Maumee Stone Company as a subsidiary in 1946 to operate a limestone quarry in Maumee, south of Toledo (A-942) and The Michigan Stone Company in 1952 to supply a large concrete customer in Toledo as well as contractors in Northern Michigan. (A-945-946, 1006-1008.) Michigan Stone has two quarries in South Michigan, but was not a factor in the asphalt paving market here at issue. It did not supply road stone on a regular basis. (A-947.) Its product went mostly to concrete producers, not involved in this case. (A-58, 947-948.) Matco, Inc. and Oamco, Inc. are subsidiaries formed to operate asphalt plants. (A-969.) Sherman E. Johnson headed the organization until his death in 1956 when J. T. Kirkby became President. (A-982.) He has a small ownership interest in

Johnson, Michigan Stone and Maumee Stone of 5%, 3% and less than 1%, respectively. (A-586, 944, 947, 981-982.)

The further diversifying acquisitions challenged by Langenderfer were all in keeping with the diversification that had been going on since 1929. The 12 challenged acquisitions, over a period of 19 years, 1961 to 1979, are as follows:

1961: Wood County Stone Company, now known as The Portage Quarry, was acquired by Maumee Stone. 729 F.2d at 1053.

1961: C. P. Calaway, Inc., a bridge-building concern, was purchased by Johnson. This enabled Johnson to extend its operations to bridge building rather than subcontracting such work to other companies. 729 F.2d at 1053.

1962: Lime City Stone Company, acquired by Maumee, operated a quarry. 729 F.2d at 1053.

1965: Auglaize Stone Company. Maumee Stone, already a one-half owner, acquired the remaining half interest. (A-944-945.) It regularly supplied Langenderfer for its Defiance plant. (A-55.) Langenderfer's three other plants were supplied by its own quarry and by France Stone Quarries. (A-56-57.)

1969: Price Manufacturing Company. Johnson bought asphalt paving equipment and acquired two asphalt plants near Port Clinton and Norwalk, which served three counties east of Toledo. (A-57-63.)

1970: Rocky Ridge. This was not an acquisition of an existing quarry, but was started up by Maumee Stone. The land is leased, not owned. 729 F.2d at 1053.

1970: The Ohio Engineering Company. With this purchase Johnson acquired three asphalt plants at Findlay, Carey and Spore, serving counties south of Toledo. 729 F.2d at 1053.

1971: Fred R. Creager & Sons, Inc. This concern was a small contractor on the verge of bankruptcy. Johnson purchased the stock for $1 and assumption of liabilities. 729 F.2d at 1053.

1972: Northwest Materials, Inc. This was primarily a purchase of equipment and sand leases. The company was being liquidated. The leases were never operated and have since lapsed. 729 F.2d at 1053-1054.

1974: Wolcottville Sand & Gravel Corp. This company had been owned by Sherman E. Johnson since the late 1950's. The stock was formally acquired by Maumee Stone in 1974. It was not a supplier of sand to Northwest Ohio at that time. The sand operation was abandoned because of the increased cost of transportation by rail. (A-967-968.)

1974: Tri-State Sand Pit in Williams County, the northwesterly county in Ohio. (A-931, 966-967.) The sand operation replaced the Wolcottville Sand & Gravel pit. (A-967-968.) The Tri-State Pit primarily supplied concrete customers and also supplied sand to three of Johnson's asphalt plants. (A-933, 940-941, 966-967.)

1979: Union Quarries Company. It operated an asphalt plant, a stone quarry, and a ready-mix concrete plant in Van Wert County. 729 F.2d at 1054.

With respect to each of the acquisitions, except the last, Union Quarries, the owners approached Johnson about the purchase, and not the other way around. (A-295-296, 318-319, 973-974, 982-983.)

Johnson was acquitted of any Clayton Act violation on all of its acquisitions—except only the Union Quarries acquisition. The rejection of most of the Clayton Act claims reduces the remainder to homeopathic proportions, essentially satisfying the Ambrose Bierce definition of a homeopathic dose as one drop mixed with Lake Superior.

Moreover, considering that Union Quarries was acquired in 1979, after Langenderfer had gone out of business, the Clayton Act claim vanishes altogether. The Union Quarries acquisition could not have hurt Langenderfer, or reduced competition, certainly not "substantially," as required by the statutory standard.

Langenderfer, went out of business in 1978, 729 F.2d at 1053, and began the liquidation of its properties, piece by piece. (A-173-175.) It sold its two asphalt plants. The only other property it retained was its office in Toledo. That property was offered for sale and was so listed with a real estate agency. (A-1157-1158.)

Johnson, a diversified contractor, was able to do its own concrete, drainage, dirt, and bridge work. Johnson bid larger jobs and a greater variety of jobs than specialized contractors such as Langenderfer which relied on subcontractors in many instances or bid as a subcontractor for the asphalt work only. (A-179.) As a consequence, the average state highway project awarded to Johnson was almost four times bigger than that awarded to Langenderfer. (A-849-850.)

Johnson had experienced estimators and field superintendents and sophisticated cost control procedures which

included weekly computer reports by project, giving the company a continuing comparison of work done with the bid estimate. (A-989-993, 1049-1050.)

Langenderfer suffered losses on many jobs and did not know whether it had made money on a particular project until the books were audited at the end of each year. (A-227.) Langenderfer's claim for damages was predicated, *not on the jobs it lost, but on the jobs it won.* (A-147-150.)

Johnson made money on its jobs at an average rate of 5.3%. Langenderfer sought to explain this on the ground Johnson charged high prices for materials and thereby subsidized its turnpike and Ohio Department of Transportation jobs.

There was no evidence to support any such claim.

The trial court found "There was no hard evidence at trial establishing the defendants engaged in these specific practices." (A-1164.)

Johnson's affiliated material suppliers sold at published prices to all comers, including Langenderfer and Johnson. (A-795, 998-999.) The material supplying companies operated at a profit significantly above the industry average for like companies. (A-863-864.)

The Court of Appeals rightly found Johnson "was more cost efficient than its competitors and could afford to submit a lower bid on the jobs in question." 729 F.2d at 1056. It "attained economies of scale which enabled it to operate at a much lower cost for paving projects than its competitors." 729 F.2d at 1058. The dissenting District Judge in the Court of Appeals recognized "Johnson's ability to operate at lower costs" but took this as "a perfect climate to predate." This enabled Johnson, the dissenting

judge thought, "to bid paving contracts at price levels above its average total costs but low enough to drive competitors out of the market." 729 F.2d at 1061.

Langenderfer failed by reason of its own shortcomings. Its experience follows the conclusion drawn by *Dunn & Bradstreet Business Failure Record* in its study of "Causes of Bankruptcy," p. 3:

> "Why does one concern survive while another concern in the same line, location, size and age goes under? In all kinds of economic climate, nine out of ten casualties can be traced to the underlying factor of managerial experience and aptitude."

CONCLUSION

This Court should not send this case back for another month of trial, and no one knows how many appeals thereafter.

Here is a fit case for summary judgment.

Langenderfer went out of business, not because of Sherman and Clayton Act violations—but because those statutes were *not* violated. They served their public purpose. That purpose was not, as Langenderfer supposes, to preserve competitors—but, to preserve competition.

To prosper that purpose, and to halt erosion of the statutes calling for public bidding, this Court should review this case.

Respectfully submitted,

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September 20, 1984

No. 84-498

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In the Supreme Court of the United States

October Term, 1984

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY,
FRED R. CREAGER & SONS, INC.,
MATCO, INC.,
OAMCO, INC.,
C. P. CALAWAY, INC.,
THE MAUMEE STONE COMPANY,
THE MICHIGAN STONE COMPANY,
WOLCOTTVILLE SAND & GRAVEL CORP. and
J. T. KIRKBY,
Petitioners,

vs.

ARTHUR S. LANGENDERFER, INC. and
NORTHERN OHIO ASPHALT PAVING CO.,
Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

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SIXTH CIRCUIT OPINION

729 F.2d 1050

(March 15, 1984)

[1050]

Nos. 80-3705, 81-3065, 81-3114
and 81-3115.

UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs-Appellees, Cross-Appellants,

MACRITCHIE MATERIALS, INC.,
Proposed-Intervenor-Appellant,
(81-3115),

v.

S.E. JOHNSON COMPANY, *et al.*,
Defendants-Appellants, Cross-Appellees.

(Argued Oct. 29, 1982,

Decided March 15, 1984)

[1052] Before LIVELY, *Chief Judge*, WELLFORD, *Circuit Judge*, and WILHOIT, *District Judge.**

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*Honorable Henry R. Wilhoit, Jr., U.S. District Court for the Eastern District of Kentucky, sitting by designation.

WELLFORD, *Circuit Judge.*

Defendants, S.E. Johnson Company (Johnson) and other affiliated entities (referred to collectively as Johnson Companies), appeal the judgments and orders entered by the district court against them following a unanimous jury verdict for plaintiffs in this private antitrust action for alleged violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, and Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18. Plaintiffs, Arthur S. Langenderfer, Inc. (Langenderfer), and its sister company, Northern Ohio Asphalt Paving Co. (NOAP), claimed defendants had combined and conspired to drive plaintiffs out of business by various monopolistic and anticompetitive practices including, but not limited to, predatory pricing and illegal acquisitions. The jury found actual damages of $982,117.00. The district court trebled the damage award to $2,946,351.00 and enjoined future acquisitions and anticompetitive acts, pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

Defendants contend the district court erred by (1) failing to apply the appropriate legal standard to plaintiff's allegation of predatory pricing; (2) allowing the jury to find a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, on the basis of purely intrastate acquisitions; and (3) allowing damages for losses suffered outside the relevant market and beyond the statute of limitations period. Langenderfer cross-appeals from the district court's refusal to order divestiture and the refusal to allow post-trial intervention by a company affiliated with Langenderfer. We vacate the judgments below because of prejudicial error on the issues of predatory pricing and intrastate acquisitions.

FACTS

Langenderfer and S.E. Johnson were competitors for many years in the business of supplying "hot-mix,"[1] stone, sand and contracting services for highway construction and repair in northwest Ohio. Most of this work is administered and paid for by governmental bodies which invite competitive bids from paving contractors.[2] Federal and state highway projects are administered by the Ohio Department of Transportation (ODOT) and the Ohio Turnpike Commission (OTC) with substantial use of federal funds.[3] For the purpose of this appeal [1053] the parties have stipulated the relevant product and geographic market to be asphalt highway paving contracts awarded by the OTC and ODOT in a thirteen county area of northwest Ohio.

Successful bidders must supply all labor, materials, equipment and supervision to do the work at per-unit prices specified in the winning bid. The primary costs in performing paving projects are the cost of materials and the cost of hauling materials to the job site. Contractors attempt to minimize expenses by purchasing ma-

---

1. "Hot-mix" is also known as asphaltic concrete. It is manufactured by combining liquid petroleum with a mixture of sand and crushed limestone at high temperatures.

2. State law requires competitive bidding. *Ohio Rev.Code* Chapters 5525 and 5537. State agencies determine where and whether a project will take place and reserve the right to reject any and all bids.

3. The volume of available highway work is directly dependent on the amount of funds allocated to the state highway program. Substantial completion of the interstate highway system in the late 1960's resulted in a significant decrease in funds allocated for new highway construction in Ohio during the 1970's. The highway program in northwestern Ohio during the 1970's was primarily limited to maintaining and upgrading the existing roadways.

terials from the quarry or hot-mix plant closest to the job.[4]

Plaintiffs, Langenderfer and NOAP are Ohio corporations with all voting stock owned by Burton R. MacRitchie and his two sons. Langenderfer was in the asphalt paving business for 55 years until it discontinued operations in 1978 due to its inability to compete profitably. Unlike many highway contractors, Langenderfer did not diversify its operations but remained an asphalt paving specialist. While Langenderfer was still in business, NOAP had four hot-mix plants in northwest Ohio. The MacRitchie family also owned MacRitchie Materials, Inc.,[5] which operated a quarry in West Millgrove, Ohio, and supplied stone to two of Langenderfer's hot-mix plants.

Defendants are the S.E. Johnson Co. (Johnson), founded as an Ohio corporation in 1929 by Sherman E. Johnson, various associated and subsidiary companies, and John T. Kirkby, the current president of Johnson. Following the Second World War, Johnson established the Maumee Stone Co. and opened a quarry to have an assured source of limestone for road building. The Michigan Stone Co. was set up in 1952 to operate two additional quarries just across the Ohio-Michigan border. With these quarries supplying raw materials and with three hot-mix plants to service the area, Johnson was, already the largest asphalt paving contractor in northwest Ohio by the time of Sherman Johnson's death in 1956.

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4. The practical service area of a hot-mix plant is limited to a 25-30 mile radius due to hauling costs and the need to deliver the product at specified temperatures. The plants are typically located at or near quarries because of the high cost of hauling stone.

5. MacRitchie Materials, Inc. is the sister company that unsuccessfully sought to intervene following the trial below.

Defendant, John T. Kirkby, succeeded Mr. Johnson as president and operating head of the defendant companies. He soon began an ambitious acquisition program, acquiring twelve different companies within a fifteen year period.

In 1961, Johnson purchased C.P. Calaway, Inc., an independent bridge contractor. This enabled it to perform its own bridge work rather than subcontracting to other companies.

Mr. Kirkby then turned his attention to vertical acquisitions of raw material sources in northwest Ohio. Defendant Maumee Stone acquired the quarries of Wood County Stone & Construction Co. (1961), Lime City Stone Co. (1962), and Auglaize Stone Co. (1965). Maumee Stone opened the Rocky Ridge quarry under a 25-year lease in 1970. In 1974, defendants acquired the Tri-State Sand & Gravel Co., which is described as the most important source of quality sand in northwest Ohio.

In the late 1960's Johnson began a series of horizontal acquisitions of asphalt paving competitors. In 1969 Johnson purchased paving equipment from the Price Construction Co., including two hot-mix plants that served three counties to the east of Toledo. When Price moved a third hot-mix plant to Maumee to compete with defendants' operation, Mr. Kirkby offered to buy out Price, but Price agreed not to compete for ten years. Johnson purchased Ohio Engineering Co. in 1970 and thereby acquired three hot-mix plants that served several counties south of Toledo. Fred R. Creager & Sons, a small contractor on the verge of bankruptcy, was purchased in 1971 for $1 and an assumption of liabilities. Johnson bought two plants and certain gravel leases in 1972 from Northwest Materials, Inc.,

[1054] which was being liquidated at the time. Except for Creager, each competitor was a viable, profitable, ODOT-qualified paving contractor. Each company except Northwest Materials was acquired under a contract whereby the sellers agreed not to compete with Johnson for a number of years. In 1979, just prior to the trial below, defendants paid $3.5 million for Union Quarries Co., a profitable competitor that owned a quarry, a hot-mix plant and an asphalt paving business that served three counties in northwest Ohio.

Substantial evidence indicated that Kirkby, both individually and as chief officer of Johnson, intended to eliminate competition and dominate the market. In addition to the noncompetition agreements previously mentioned, there was considerable testimony that Kirkby or his agents had threatened or coerced several smaller competitors. Kirkby allegedly told one competitor that if he built an asphalt plant to compete with the Maumee plant, defendants would immediately build a larger facility across the street to drive the competition out of business. Another competitor who planned to build a hot-mix plant was told that defendant would not supply the necessary stone for operation of the plant. On another occasion, Kirkby allegedly said that he did not like Langenderfer or Miller (another competitor) and wanted to run them out of business.

Langenderfer presented expert testimony from several economists to the effect that Johnson's acquisitions significantly reduced competition and increased market concentration, thereby creating a monopolistic market structure. Statistical evidence does support this testimony. Defendants' average annual share of ODOT and OTC projects from 1966-1971 was 46.9%, but they took well over half

of the available work during the 1972-78 period.[6] Johnson Companies did 75.8% of all turnpike paving in northwest Ohio during this period.

In summary, Kirkby expanded operations of the Johnson Companies from two quarries and three hot-mix plants to seven quarries, fourteen hot-mix plants, and three sand pits. The horizontal acquisitions eliminated a noticeable segment of Johnson Companies' competition, and the vertical acquisitions gave defendants a captive supply of stone and sand for its asphalt paving jobs. Furthermore, defendants became primary stone suppliers for the remaining asphalt paving competitors who did not own conveniently located quarries. As Johnson increased its share of the ever decreasing market, it also increased its profitability. From 1970 to 1978, its annual net profits more than doubled—from $1.168 to $2.717 million. During this same period, the Johnson Companies' competitors went from a combined net profit of $655,000 to a combined net loss.

Langenderfer's claims of unreasonable restraint of trade in violation of Section 1 of the Sherman Act, monopolization and conspiracy or attempt to monopolize in violation of Section 2 of the Sherman Act, and illegal anticompetitive acquisitions in violation of Section 7 of the Clayton Act were all submitted to the jury. In support of the Sherman Act claims, Langenderfer alleged twelve separate monopolistic acts including, among others, predatory pricing, monopolistic pricing, price discrimination, exclusive dealing, refusals to deal, tying, and profit squeezing. The trial court denied defendants' request for special interrogatories. In returning the general verdict

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6. Defendants' annual shares of the relevant ODOT and OTC projects were as follows: 1972—65.3%; 1973—57.6%; 1974—82.5%; 1975—53.2%; 1976—62.6%; 1977—70.4%; 1978—51.3%.

in favor of Langenderfer the jury was not required to specify which portions of the Sherman and/or Clayton Acts were violated nor which of the various alleged monopolistic acts were committed by appellants.

PREDATORY PRICING

In order to recover under Section 2 of the Sherman Act, whether for monopolization[7] [1055] or an attempt to monopolize,[8] Langenderfer had to establish that Johnson engaged in some type of prohibited anticompetitive conduct. *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir.1982). Langenderfer alleged several different kinds of anticompetitive acts, but the evidence presented at trial clearly focused on the claim of predatory pricing.[9] As the district court stated in the January 27, 1981, Final Judgment for Injunctive Relief:

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7. To establish monopolization of the ODOT-OTC asphalt paving market, Langenderfer had to prove that Johnson unfairly attained or maintained monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). Monopoly power is "the power to control prices or exclude competition." *Id.* at 571, 86 S.Ct. at 1704.

8. To establish that Johnson attempted to monopolize the ODOT-OTC asphalt paving market Langenderfer had to prove that appellant "engaged in anticompetitive conduct with the specific intent to monopolize and that the attempt had a dangerous probability of success." *Richter Concrete Corp. v. Hilltop Corp.*, 691 F.2d 818, 823 (6th Cir.1982), (quoting *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981)).

9. Support for the allegations of other types of anticompetitive conduct was meager at best. Although injunctive relief was granted against a broad array of wrongful acts, the trial court made the following observation about Langenderfer's proof:

> Plaintiffs request injunctions against certain anticompetitive practices of the defendants *which were not specifically proven by evidence at trial.* For example, plaintiffs seek prohibitions against the defendants' alleged practices of charging discriminatory stone prices, refusing to sell stone or sand to plaintiffs, and tying sales of asphaltic concrete to purchases of stone and sand. (emphasis added)

> The major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding on ODOT and OTC projects. At trial, plaintiffs vigorously attempted to show how defendants deliberately excluded competition by bidding low and deliberately sacrificing short term profits for the purpose of driving rivals out of business.

Defendants contend that as a matter of law, predatory pricing was not established because Langenderfer presented no evidence that Johnson ever submitted a bid for an ODOT or OTC project at less than cost plus overhead.[10] In fact, defendants consistently made a profit on their successfully bid state highway and turnpike projects. Nevertheless, the district court denied Johnson's motion for a directed verdict on the issue and chose not to instruct the jury on the legal test for predatory pricing.[11] Instead, the trial court "felt it was appropriate to let the jury decide where that line was to be drawn." We conclude from all the evidence, however, that the trial court erred by failing to grant a directed verdict in favor of defendants on the issue of predatory pricing.

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10. Langenderfer attempts to rely on the testimony of Howard Shank who was Johnson's Vice President and chief bidding estimator. Shank testified that in preparing bids, he often programmed specific items below cost. The relevant product in this case, however, was the *total package* of asphalt paving materials and services, not specific line items in a contract bid. It matters little that Johnson might have employed a below-cost figure for gravel or any other item so long as the final bid exceeded the company's *total projected costs.*

11. Even if the evidence had been sufficient to avoid a directed verdict, the trial court's failure to instruct the jury on the legal standard for predatory pricing was erroneous. "The choice of a cost-based standard for evaluating claims of predatory pricing is a question of law to be decided by the trial judge." *M.C.I. Communications Corp. v. A.T. & T. Co.*, 708 F.2d 1081, 1111 (7th Cir.1983).

While we recognize the basis for Judge Wilhoit's concern as to predatory pricing, we are unpersuaded by his argument. If a producer has achieved greater efficiency due to his economies of scale, it would be contrary to the purposes of the Antitrust laws to require that he price his product at a level higher than what he requires to make a profit. Johnson continually made profits on its ventures. This is not a case where the defendant failed to account for his long term overhead costs in making his bids. The bids were above the *total* average costs. To require that Johnson's bids be above competitors' costs would deprive Johnson (and others similarly situated) of [1056] reward from greater efficiency. This would serve only to stifle the incentive to compete.[12] Such cannot be the aim of the Antitrust laws of this country. *See, MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir.1983); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir.1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed. 2d 792 (1977).

At the time of the trial below, this Circuit had not definitely declared a standard for evaluating claims of predatory pricing. Subsequently, however, a cost-based

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12. Further support for his decision may be drawn from Judge Kennedy's dissent in *Borden, Inc. v. F.T.C.*, 674 F.2d 498, 519 (6th Cir.1982). While that case dealt with the manipulation of a price premium for a heavily advertised product, not below cost pricing, it was noted by that Judge that "business acumen includes shrewdness in profitable price competition, which is pricing above average variable cost; the Sherman Act does not distinguish competition on the basis of price and performance." *Id.*, citing *California Computer Products v. International Business Machines Corp.*, 613 F.2d 727, 742-43 (9th Cir.1979). *See also* Areeda & Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," 88 Harv.L.Rev. 697 (1975). Professor (now Judge) Posner would also agree that there is no violation where a monopolist sells above average total cost, as in the instant case. R. Posner, *Antitrust Law: An Economic Perspective*, 188 (1976), *cited in Borden, Inc. v. F.T.C.*, 674 F.2d at 519 n. 3. (Kennedy, dissenting).

standard was adopted in *D.E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir.1983), this court selected the Ninth Circuit's modification of the "Areeda/Turner" rule. *See* Areeda & Turner, *Predatory Pricing & Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975) (Pricing below marginal or average variable cost presumed predatory while pricing above marginal or average cost conclusively presumed legal). The Ninth Circuit standard was set forth in *William Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir.1981), *cert. denied*, ... U.S. ....., 103 S.Ct. 57, 74 L.Ed.2d 61 (1982):

> [W]e hold that to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Id. at 1035-36. Although this Circuit has adopted the above standard, we reject the Ninth Circuit's recent extension of that standard in *Transamerica Computer Co. v. I.B.M. Corp.*, 698 F.2d 1377 (9th Cir.1983) (pricing above average total costs may be deemed predatory upon clear and convincing proof of predatory intent).

Langenderfer's theory at trial (and in this appeal) was that defendants intentionally and consistently bid below the cost level of smaller competitors. Allegedly, Johnson could have submitted higher bids and still won the paving contracts, but it "left money on the table" in order to make it impossible for other firms to compete. Although Johnson never bid below its own cost, it supposedly engaged in a pattern of predation by forcing competitors to choose between foregoing sales or operating at a loss. No doubt this was an unpleasant choice fo smaller firms such as Langenderfer, but Johnson cannot be found to have committed predatory pricing simply because it was more cost efficient than its competitors and could afford to submit a lower bid on the jobs in question. "It is the very nature of competition that the vigorous, efficient firm will drive out less efficient firms. This is not proscribed by the antitrust laws." *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, [1057] 855 (9th Cir.1977), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978).

Langenderfer's argument is premised on the false belief that predatory pricing may be found solely on the basis of the seller's intent. We agree that motive or intent is the distinguishing characteristic of predatory pricing, as this Circuit stated in *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir.1982):

> Predatory pricing differs from healthy competitive pricing in its motive: "a predator by his pricing practices seeks 'to impose losses on other firms not garner gains for itself.'" *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853-54 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981) (footnote omitted).

691 F.2d at 823. Any definition of predatory pricing, however, must also accommodate the economic policies of the antitrust laws to promote efficiency, encourage vigorous competition and maximize consumer welfare.

The rule advocated by Langenderfer would work contrary to these goals by forcing a larger, more efficient firm to maintain artificially high prices to the detriment of the public. In *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir.1983), the court thoroughly reviewed the multiple evils that such a rule would occasion:

> MCI nonetheless argues in its cross-appeal that the district court erred in requiring it to prove that AT & T priced its Hi-Lo service below any measure of cost. MCI contends that if AT & T knowingly sacrificed revenue (i.e., failed to maximize its profits) with the intent to injure competition, this court should hold that behavior to constitute unlawful predatory pricing. In support of this "profit maximization" theory, MCI cites a trio of cases. *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358 n. 5 (9th Cir.1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir.1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F.Supp. 423, 432 (N.D.Cal.1978), *aff'd. per curiam sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir.1980), *cert. denied*, 452 U.S. 972, 101 S.Ct. 3126, 69 L.Ed.2d 983 (1981).
>
> Each of these cases contains language to the effect that a price may be predatory if it is below the short-run profit-maximizing price and barriers to

> new entry are great. Assuming, *arguendo,* that these statements are more than mere dicta, we must reject such a "profit maximization" theory as incompatible with the basic principles of antitrust. The ultimate danger of monopoly power is that prices will be too high, not too low. A rule of predation based on the failure to maximize profits would rob consumers of the benefits of any price reductions by dominant firms facing new competition. Such a rule would tend to freeze the prices of dominant firms at their monopoly levels and would prevent many pro-competitive price cuts beneficial to consumers and other purchasers. In addition a "profit maximization" rule would require extensive knowledge of *demand* characteristics—thus adding to its complexity and uncertainty. Another, and related, effect of adopting the "profit maximization" theory advocated by MCI would be to thrust the courts into the unseemly role of monitoring industrial prices to detect, on a long term basis, an elusive absence of "profit maximization." Such supervision is incompatible with the functioning of private markets. It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition. *See Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 273 (2d Cir.1979), *cert. denied,* 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). We therefore reject MCI's "profit maximization" theory and reaffirm this Circuit's holding that liability for predatory pricing must be based upon proof of pricing [1058] below cost. *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.,* 615 F.2d 427 (7th Cir.1980).

Id. at 1114 (footnote omitted). As more succinctly stated in *Hanson v. Shell Oil Co.,* 541 F.2d 1352 (9th Cir.1976),

cert. denied, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977):

> The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. The Sherman Act is not a subsidy for inefficiency.

Id. at 1358-59. We agree with this rationale expressed in the *MCI* and *Hanson* cases.

Johnson attained economies of scale which enabled it to operate at a much lower cost per paving project than its competitors. On the basis of the record presented, we can express no opinion about whether this position of strength may have resulted from some other types of prohibited anticompetitive acts. We hold only that, as a matter of law, Sherman Act liability cannot be premised on alleged predatory pricing without some evidence that a defendant has charged prices below its total cost for the product sold. Since Langenderfer premised its allegation of anticompetitive conduct almost entirely on the claim of predatory pricing and since the jury was not required to return special interrogatories, we cannot discern whether the jury verdict was based on the legally insufficient proof of predatory pricing or on the other allegations of anticompetitive acts. Consequently, we must vacate the judgment below and remand for new trial.

ACQUISITIONS

Johnson raises two arguments against assessment of liability for violations of Section 7 of the Clayton Act.

First, defendants note that six of the acquired companies[13] rarely, if ever, competed with Langenderfer before they were acquired by Johnson. Consequently, they claim the acquisitions had no "anticompetitive effect" on Langenderfer as required under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). We find the argument unpersuasive because appellant mistakenly focuses on *past* competition between Langenderfer and the acquired companies, and because appellant has misinterpreted the holding in *Brunswick*.

The plaintiff in *Brunswick* sought to recover profits it claimed it would have reaped if Brunswick had not acquired and revitalized several failing bowling alleys that competed with plaintiff. Since the antitrust laws were never intended to provide redress for injury caused by *increased* competition, the court rejected plaintiff's theory.

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which made defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489, 97 S.Ct. at 697. *Brunswick* does not require proof that the acquisitions had an "anticompetitive effect" *on* Langenderfer. Instead, *Brunswick* requires that Langenderfer's injury result either from a lessening of competition due to the acquisitions or from "anticompetitive

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13. C.P. Calaway, Inc., Price Construction Co., Ohio Engineering, Fred R. Creager & Sons, Northwest Materials, Inc. and Union Quarries Company.

acts made possible" by the acquisitions. One of Langenderfer's theories at trial was that the acquisitions eliminated the competitive pressures of the acquired companies and enabled defendants to engage in other monopolistic acts such as monopolistic pricing, profit squeezing, and predatory bidding. If true, this alone satisfies the requirement of *Brunswick*. Absent other error regarding the Clayton Act cause of action, the issue of whether Langenderfer's injuries resulted from "anticompetitive acts made [1059] possible" by the acquisitions was properly a jury question.

Johnson next argues that none of the acquisitions met the jurisdictional requirement of Section 7 of the Clayton Act. At the time of trial the statute was limited to corporate acquisitions where both the acquiring and the acquired companies engaged in interstate commerce.[14] The district court granted Langenderfer's motion for a directed verdict as to Clayton Act jurisdiction because the companies all performed work on interstate highways. The court clearly erred.

In *United States v. American Building Maintenance Industries*, 422 U.S. 271, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975), the Supreme Court held that the Clayton Act, unlike the Sherman Act, does not reach companies engaged in purely intrastate activities even though there may be a substantial effect on interstate commerce. Langenderfer relies on *Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871, 872 (5th Cir.), *cert. denied*, 379 U.S.

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14. The statute was amended in 1980 to expand jurisdiction to acquisitions in which both the acquiring and the acquired companies are "engaged in commerce or in any activity affecting commerce." Pub.L. No. 96-349, § 6(a), 94 Stat. 1157. Section 6(b) of Pub.L. No. 96-349 limited application of the amendment to acquisitions made after September 12, 1980.

900, 85 S.Ct. 187, 13 L.Ed.2d 175 (1964), for the rule that "contractors engaged in the construction of interstate highways and other facilities of interstate commerce are engaged 'in commerce.'" That "rule" is no longer valid, however, in light of *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). In *Copp Paving*, the Court reviewed the uniquely localized nature of asphalt hot-mix markets and held that intrastate sales of asphalt for use on interstate highways was not alone sufficient to establish jurisdiction under the Clayton Act.

With the exception of Union Quarries Co., there is no evidence in the record that any of the acquired companies were directly engaged in interstate commerce. Langenderfer apparently chose to rely solely on the interstate highway nexus, as did the district court. As noted above, this was clear error under *American Building Maintenance* and *Copp Paving*. Based on the evidence presented at trial, the district court erred by granting a directed verdict in favor of Langenderfer, and by denying a directed verdict for Johnson Companies on the Clayton Act cause of action as to all of the acquisitions except Union Quarries Co.

Because of errors on the issues of Clayton Act jurisdiction and predatory pricing we conclude that we must vacate the judgment below. Consequently, we find it unnecessary to address appellants' arguments regarding the scope of damages allowed, and we express no opinion about the possible merits of those arguments.

DIVESTITURE

On cross appeal Langenderfer contends the trial court erred by refusing to order divestiture of Union Quarries,

Tri-State Sand & Gravel, two of Johnson's six quarries, and four of Johnson's twelve hot-mix plants. The district court held that the drastic remedy of divestiture was not necessary to restore competition. The court also doubted its authority to grant divestiture in favor of a private plaintiff under Section 16 of the Clayton Act.

Langenderfer correctly observes that Section 16 injunctive relief has three primary purposes: "(1) putting an end to illegal conduct, (2) depriving violators of the benefits of their illegal conduct, and (3) restoring competition in the marketplace." *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234 (9th Cir.1976) (citing *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128-29, 68 S.Ct. 947, 957-58, 92 L.Ed. 1245 (1948)). We cannot, however, agree with Langenderfer's claim that the trial court's injunction against future acquisitions and anticompetitive acts only furthers the first of these purposes. Assuming culpability on the part of Johnson Companies, we believe the district court's injunction not only would deprive them of the primary benefits of their past [1060] conduct—continued growth through acquisitions and guaranteed market dominance for the future—but also would serve to bring about a greater degree of competition by eliminating the barriers allegedly erected. In any event, the fact that the remedy fashioned by the district court may have served certain purposes to a lesser extent than others provides no ground for assignment of error.

The more fundamental flaw in Langenderfer's argument is the proposition that divestiture is an available remedy in a suit instituted by a private plaintiff. Although several district courts have suggested that the remedy should be available, no court of appeals has so held. We find compelling the Ninth Circuit's decision,

based on the legislative history of Section 16, that the statute does not create a private divestiture remedy. *I.T. & T. Corp. v. G.T.E. Corp.*, 518 F.2d 913, 920-24 (9th Cir. 1975). *See also, Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692-94 (9th Cir.1976); *Continental Securities Co. v. Michigan Central Ry. Co.*, 16 F.2d 378, 379-80 (6th Cir.1926).

PERMISSIVE INTERVENTION

MacRitchie Materials Co., a quarry operator and sister company of Langenderfer, filed a post-trial motion for permissive intervention in the injunctive relief hearings pursuant to Fed.R.Civ.P. 24(b). MacRitchie argued that it had an interest in the injunction proceedings because its own business interests were affected by Johnson's monopolistic practices. The district court found that MacRitchie's claims did not present sufficiently common questions of law and fact as had been addressed during trial and, accordingly, denied the motion. Claiming error, MacRitchie has cross-appealed the trial court ruling.

"[T]he denial of permissive intervention should be reversed only for clear abuse of discretion." *FMC Corp. v. Keizer Equipment Co.*, 433 F.2d 654, 656 (6th Cir.1970); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222 (6th Cir. 1975). We find no abuse of discretion in this case. The trial below focused on the impact of Johnson's practices on a particular competitor in the asphalt paving market. MacRitchie, a different competitor in a different product market, cannot now complain about the denial of a post-trial motion filed four years after commencement of this action.

For the reasons set forth above, the judgment of the district court is VACATED and this case is REMANDED for retrial.

WILHOIT, *District Judge*, dissenting.

I respectfully dissent from the Court's view that as a matter of law, Sherman Act liability on the basis of predatory pricing cannot be proven without some evidence that a defendant has charged prices below its average *total* cost. This circuit has previously taken the view that evidence of intent to predatorily price can be proven either by direct evidence (subjective proof) or by indirect evidence, through analysis, of whether a defendant was pricing above or below average variable cost (objective proof). The latter analysis provides a surrogate measurement for marginal cost at output levels at or near a firm's optimal level of production. *See D.E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir.1983); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir.1982); *Borden, Inc. v. Federal Trade Commission*, 674 F.2d 498 (6th Cir.1982).[1]

[1061] The Court takes a different approach today. It says, in effect, that irrespective of any direct evidence of intent to predatorily price, if a defendant can prove objectively that his prices were above his average total

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1. As the Court notes in its opinion, this Circuit has recently adopted the Ninth Circuit's modified "Areeda/Turner" rule. *See ante* at 1056. Areeda and Turner first propounded a most influential discussion of how a determination of average variable costs can fairly approximate marginal costs at output levels at or near a firm's optimal level of output. That level, of course, is where a firm is producing at its minimum average costs. Areeda & Turner, *Predatory Pricing & Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975).

D.E. Rogers, 718 F.2d 1431, the case in which this circuit adopted the modified "Areeda/Turner" rule, makes no mention of what the rule should be in situations where, as here, the defendant was pricing at a level above average *total* cost. Areeda and Turner would presume such to be legal. The majority today agrees. I do not, however, because I believe evidence of intent in circumstances such as presented in this case should play a substantial role in determining whether predatory pricing has occurred.

costs, his conduct is *per se* legal. This gives me pause. What the Court seems to do is to create a "free zone" in which monopolists can exploit their power without fear of Sherman Act scrutiny or sanctions. *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1387 (9th Cir.1983).

The fact is that the question of proving average variable and fixed costs can be most difficult. Indeed, another panel of this court recently confronted a perfect example of just how hard it is to allocate "costs" in antitrust cases. *See D.E. Rogers*, 718 F.2d at 1435. In that case there was a great deal of argument as to what should be included in the average cost figures. Due to the inherent uncertainty and imprecision in determining "cost," I am persuaded by the view expressed by the Ninth Circuit Court of Appeals in that it is simply unwise to create a *per se* legal zone of predatory pricing irrespective of other conduct and circumstances. *See Transamerica*, 698 F.2d at 1387. To do so simply encourages litigants to skewer their accounting data to be above or below average *total* cost.

Beyond these practical problems of proof, the record in this case convinces me that Johnson was found to be guilty of monopolistic practices, including predatory pricing. The evidence is clear that Johnson specifically intended to drive Langenderfer out of business. Moreover, Johnson's rapid and numerous vertical as well as horizontal acquisitions documents well that it had the power to carry out this intent.

The alleged predatory pricing in this case was nothing more than a manifestation of Johnson's monopoly power. The majority readily admits that Johnson had "attained economies of scale which enabled it to operate at a much

lower cost per paving project than its competitors." *Ante* at 1058. It is clear, therefore, that Johnson possessed substantial market power over its competitors, market power which when coupled with the evidence of Johnson's increasing market share (from 46.9% to 75.8%) indicates it undoubtedly possessed *monopoly* power.

Because Johnson possessed monopoly power, the only other issue for purposes of determining § 2 Sherman Act liability is whether Johnson acquired or maintained that power willfully and intentionally as opposed to mere growth due to a superior product or business acumen. *See United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). In this case, I believe that Johnson willfully and intentionally used its inordinate market power to acquire and maintain a monopoly. Direct evidence of its intent substantiates this. But more importantly, Johnson's conduct establishes it in my mind beyond all doubt.

In an industry such as involved here, entrance barriers are unusually high. Start-up costs are enormous. Moreover, Johnson raised these entrance barriers even higher by its many vertical acquisitions. Competitors and potential competitors were discouraged from competing with Johnson because they had to get their supplies from Johnson.

In addition, because of Johnson's ability to operate at lower costs, a perfect climate existed for Johnson to predate. Johnson was able to bid paving contracts at price levels above its average total costs but low enough to drive competitors out of the market and discourage potential competitors from entering. This practice has sometimes been called "limit pricing" and the fear that

a monopolist might undertake it was what probably inspired the Ninth Circuit in *Transamerica.*[2]

[1062] The majority lays aside the many circumstances raised in this case and focuses instead on the pristine economic view that pricing at or above average *total* cost is what competition is supposed to effect.

Unfortunately, the real world is not as it is always assumed in economics. If predatory pricing were the only allegation made in this case and there were no other evidences of monopoly power or monopolistic conduct and intent, I would agree with the majority. Predatory pricing cannot and should not be a competitor's complaint absent an abundance of evidence suggesting the alleged predator not only has the intent to predate, but also the ready ability, as in this case, to carry predation out. Cf. *Transamerica,* 698 F.2d at 1388.[3]

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2. In *Transamerica,* 698 F.2d at 1387, the Ninth Circuit discusses how, in an industry where a substantial initial investment is required, a monopolist could predate with a pricing strategy that is above average *total* cost but below the profit maximizing price of competitors or potential competitors. This strategy is labeled "limit pricing", and appears to be the type of strategy employed by Johnson here.

3. The *Transamerica* case's so-called "extension", *see ante* at 1056, of *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014 (9th Cir.1981), *cert. denied,* ..... U.S. ....., 103 S.Ct. 58, 74 L.Ed.2d 6[illegible] (1982), which the majority today refuses to follow, is the natural outgrowth of the *Inglis* case. The Ninth Circuit has consistently indicated, even prior to *Inglis,* that given the right set of facts concerning a defendant's motive and conduct, it might very well hold a limit pricing strategy impermissible. *See California Computer Product, Inc. v. IBM Corp.,* 613 F.2d 727, 743 (9th Cir.1979); *Hanson v. Shell Oil Co.,* 541 F.2d 1352, 1358 n. 5 (9th Cir.1976), *cert. denied,* 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

The *Transamerica* case takes the *Inglis* rule the next logical step and adopts a reasonable view of how to treat an alleged predator's prices that are above its average total cost. It allocates a heavy burden upon the plaintiff to prove by clear and

(Continued on following page)

Nonetheless, as pointed out, I am firmly convinced by the record at hand that Johnson possessed monopoly power and that it used predatory pricing in the form of "limit pricing," among other things such as restrictive contracts and acquisitions, to maintain that monopoly power.

For instance, the majority opinion seems to dismiss the testimony of Howard Shank, Johnson's Vice-President, as mattering little. *See ante* at 1055 n. 10. The Court's view of Shank's testimony might be correct in other circumstances but on the facts of this case, it overlooks the extent of Johnson's vertical integration. The Court states that "[i]t matters little that Johnson might have employed a below-cost figure for gravel or any other item so long as the final bid exceeded the company's *total projected costs.*" *Id.* (emphasis in original).

This overlooks the fact that Johnson was probably the only supplier of gravel in the relevant region. It supplied both its own needs and that of its competitors. Johnson could, therefore, raise the price of gravel to its competitors and thereby subsidize sales of gravel to itself.

Footnote continued—

convincing evidence, that the defendant was predatorily pricing. *Transamerica*, 698 F.2d at 1388. At the same time, however, it does not allow a monopolist, such as Johnson in this case to escape liability on the basis of predatory pricing merely because it did not price below its average total cost.

The *D.E. Rogers*, 718 F.2d at 1436, case in this circuit likewise suggests that the Sixth Circuit would not permit a limit pricing scheme at or above average total cost upon a strong showing of motive and/or other monopolistic conduct. While *D.E. Rogers* does not directly present the issue decided today, it does indicate just as *Transamerica's* predecessors that "direct evidence bearing on the issue of [a defendant's] motive" is an important consideration. *Id.* at 1437. Indeed, only because of the absence of, or ambiguous nature of, such direct evidence was a cost-based analysis even resorted to in that case. *See id.* at 1435.

These below-cost *line* items may very well be a significant indicator of how Johnson was able to keep its "average total cost" figures so low. Having convinced the court that its "costs" were low, indeed lower than its final bid, Johnson has all but successfully defended this action for under the rule announced today, skillful juggling of cost figures has put appellant in the *per se* legal zone, i.e., pricing above average total costs.

I, therefore, respectfully dissent from the majority's view. I think Johnson possessed monopoly power and intended, as evidenced by its conduct, to maintain that power in contravention of Section 2 of the Sherman Act. I would therefore affirm [1063] the district court and remand this case only with respect to the question of remedy.

DISTRICT COURT OPINION

Denying Johnson Motion for Judgment n.o.v.

(September 29, 1980)

Case No. C 76-425

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

OPINION AND ORDER

YOUNG, *J.*:

This cause came to be heard upon the filing by defendants of a motion for a new trial and a motion for judgment notwithstanding the verdict. These motions have been opposed by plaintiffs.

This is a private antitrust action brought by the Arthur S. Langenderfer Company (Langenderfer) against the S. E. Johnson Company (S. E. Johnson) and other affiliated entities. Plaintiff is an asphalt paving contractor which formerly bid paving projects in northwest Ohio for the Ohio Turnpike Commission (OTC) and for the Ohio Department of Transportation (ODOT). The complaint alleges that the defendants S. E. Johnson and its numerous subsidiaries unreasonably restrained trade and monop-

olized, attempted and conspired to monopolize the asphalt paving industry in northwest Ohio in OTC and ODOT work in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, and of Section 7 of the Clayton Act, 15 U.S.C. §18. Plaintiff alleges that the anticompetitive practices of the defendants, including, *inter alia*, predatory bidding and the outright acquisition of several competitors, caused the plaintiffs to be driven out of the business of bidding on ODOT and OTC paving contracts in a thirteen county area of northwest Ohio.

This case was tried to a twelve member jury, in a trial commencing on March 3, 1980. On April 2, 1980, the jury returned a unanimous verdict in favor of plaintiffs in the amount of $982,117.00. In an order filed simultaneously herewith, this Court trebled the actual damages and entered a judgment of $2,946,351.00.

Defendants now move for a new trial and for judgment notwithstanding the verdict, raising several grounds. The Court will consider each of the grounds separately herein.

First, defendants urge that plaintiffs' claims under the Sherman Act should be dismissed as a matter of law for the reason that no evidence of monopoly power of the defendants was adduced at trial. Monopoly power is typically defined as the power to control prices or exclude competition in a specific market. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Whether monopoly power exists for the purposes of Section 2 of the Sherman Act requires first a determination of the market within which it is to be measured and of defendant's share of that market. Antitrust law is clear that no specific market share will result in a prohibited monopoly. The result depends on the facts of each par-

ticular case. The identification of a market and the calculation of the defendant's share in that market are primarily questions of fact for the jury to decide. *See e.g. Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F. 2d 72, 82 n.18 (3d Cir. 1977). It is also a jury question whether the defendant had the power to control market prices or exclude competition within that market.

In the present case, the jury was properly instructed on the definition of the relevant markets and on the elements necessary to establish a monopoly in violation of the Sherman Act. The jury rendered its decision based on a month-long trial, after hearing the testimony of many witnesses and after scrutinizing voluminous exhibits. Plaintiff introduced evidence which showed defendants' large market shares of ODOT and OTC projects let in northwest Ohio, defendants' numerous acquisitions of competing paving contractors and stone and sand pits and several other episodes of alleged anti-competitive practices. This evidence was clearly sufficient to raise a question of fact for the jury as to the existence of monopoly power, a question on which reasonable minds could have reached different conclusions.

Further, it was not necessary for plaintiffs to show actual monopolization under §2 of the Sherman Act. It was sufficient for them to show attempt or conspiracy to monopolize. While these latter violations of §2 do not require actual achievement of monopoly power, they require a specific intent to control market prices or eliminate competition, along with other evidence of predatory conduct.

The trial transcript is replete with evidence from which the jury could have concluded that the defendants had the specific intent to monopolize. The testimony in-

cluded statements made by J. T. Kirkby to competitors, wherein Kirkby threatened to run one competitor out of business and warned another not to bid S. E. Johnson's state work. Plaintiffs' experts testified as to the predatory nature of defendants' bidding practices. Also, defendants' market shares of ODOT and OTC work demonstrate that defendants were, at least, close to achieving monopoly power in bidding ODOT and OTC projects. There was sufficient evidence from which reasonable minds could find the elements of attempt or conspiracy to monopolize under §2 of the Sherman Act.

As a second reason in support of its motion, defendants contend that plaintiffs failed to establish that defendants' anticompetitive practices were the proximate cause of Langenderfer's demise as an asphalt paving contractor. Defendants urge that plaintiff's downfall was caused, in part, by a declining market for ODOT and OTC work. At trial, defendants also cited many other factors which could affect the profitability of a company. Defendants suggested to the jury that plaintiff's own inefficiency, rather than the bidding practices of the defendants, caused injury to the plaintiffs.

The question of causation of plaintiff's injuries is a question of fact for the jury to resolve. *Costner v. Blount Nat'l Bank of Maryville, Tennessee*, 578 F. 2d 1192, 1195 (6th Cir. 1978). Defendants made many of these same causation arguments to the jury during closing arguments. Upon considering all the evidence, the jury resolved the causation question in favor of the plaintiffs under proper instructions.

In ruling on a motion for judgment notwithstanding the verdict, the Court may not undertake to weigh the evidence nor substitute its judgment for that of the jury.

Rather, the Court must view all the evidence in the light most favorable to the party who secured the jury verdict, drawing from that evidence all reasonable inferences in his favor. *Morelock v. NCR Corp.*, 586 F. 2d 1096, 1104-05 (6th Cir. 1978) (and the authorities cited therein). A court should grant a motion for judgment N.O.V. only if the evidence is so overwhelmingly preponderant in favor of the movant as to admit of no other reasonable conclusion. *See* 5A *Moore's Federal Practice* ¶ 50.07[2]. With this proper standard of review in mind, this Court must conclude that these evidentiary questions now raised by defendants regarding monopolization, attempted monopolization, conspiracy and causation must be resolved in favor of plaintiffs in ruling on the present motions.

A similar result is required in connection with defendants' contention that the jury awarded several types of damages which were impermissible. Defendants urge that the jury's award of damages was invalid because 1) the damages included losses not related to the relevant market; 2) the base period selected (1968-1970) was not a proper reference because market conditions have changed since that time; 3) the use of state-wide averages was improper; and 4) the four-year statute of limitations of the Clayton Act, 15 U.S.C. §15(b), bars any recovery for damages suffered by plaintiffs prior to August 26, 1972.

This Court finds that all of these arguments attacking plaintiffs damage claims were made to the jury during closing arguments. Defendants also introduced evidence during trial in an effort to show that present market conditions differed from those of the base period and that plaintiffs' damage requests included losses outside the relevant market. These questions regarding damages

are factual questions which were resolved by the jury, who were instructed on the proper measure of damages and cautioned against awarding speculative damages.

As an additional ground in support of its motions, defendants contend there was no evidence of an unreasonable restraint of trade under §1 of the Sherman Act. Defendants assert that plaintiffs' case rested chiefly on the alleged predatory bidding practices of the defendants. Defendants contend that their bidding practices were not unlawful under the antitrust laws since the evidence showed that the defendants' bids on ODOT and OTC projects were always above their own costs and that they were consistently making a profit at their bid prices. Defendants cite numerous cases which have held that predatory pricing or bidding can be found only where the alleged predator is bidding below its own average variable costs. *See the discussion in Pacific Engineering Co. v. Kerr-McGee Corp.*, 551 F. 2d 790, 795-97 (10th Cir. 1977), *cert. denied*, 434 U.S. 879 (1977).

In response, plaintiffs cite recent cases which purportedly have formulated definitions of predatory pricing which do not rely strictly upon price/cost relationships. These cases hold that bidding above one's own costs may still be found to be predatory if there is also direct proof of specific intent to exclude competition or proof of a dangerous probability of success. *See Transamerica Computer Co. v. International Business Machines Corp.*, 1979-2 Trade Cases ¶ 62,989 (N.D. Cal. 1979); *Hanson v. Shell Oil Co.*, 541 F. 2d 1352, 1358 n. 5 (9th Cir. 1976); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F. 2d 714, 723 (5th Cir. 1975).

Courts and scholars have not clearly delineated what practices should constitute unlawful predatory pricing. It

suffices to say that no simple mechanical rule using price/cost relationships has developed. Whichever test is followed, a usual earmark of predatory pricing is "the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 698-99 (1975).

This Court recognizes the difficulties in formulating a legal definition of predatory pricing. Legally and factually, there is a fine line between competitive pricing and predatory conduct. In this case, the Court felt it was appropriate to let the jury decide where that line was to be drawn. With the combined background of their human experiences, a jury has the unique ability to resolve such factual questions, to sense an anti-competitive animus, and to recognize predatory conduct.

Defendants move to dismiss the claims against several of the corporate defendants on the ground that the evidence showed no direct individual participation by each of the defendants in the unlawful activities. This Court agrees with plaintiffs that these defendants should not be released from liability solely because they played a lesser role in the alleged antitrust violations. All the defendants are under the common ownership and control of the principal defendant, S. E. Johnson. Upon consideration of all the evidence in this case, this Court finds no compelling reason to impose separate liability on selected defendants.

Defendants move to dismiss the antitrust claims against the individual defendant J. T. Kirkby for the reason that the liability of an officer of a corporation under the

antitrust laws is limited to instances of personal participation in inherently wrongful conduct. Plaintiffs respond by citing evidence of defendant Kirkby's personal participation in defendants' anti-competitive practices. In their opposition to defendants' motions, plaintiffs state emphatically:

> "Taking the individual defendant Kirkby by himself, it is evident that he was the architect of the master plan: he engineered and negotiated the illegal acquisitions; he established or approved the monopolistic or discriminatory stone and hot mix prices; he personally supervised and priced the predatory bidding; he personally threatened to run Gills out of business and told Sader not to bid Johnson's state work; he was the one who decided to bid unreasonably low to exclude competition; the combination would not have worked without him. Even using defendants' own case authority, defendant Kirkby was up to his eyeballs both in implementing and knowing approval of 'inherently wrongful conduct.' If any defendant is liable for *all* the defendants' illegal acts, John T. Kirkby is."

This Court finds that there was sufficient evidence adduced at trial to convince a reasonable juror that defendant Kirkby personally participated in a wide range of anti-competitive practices.

Finally, this Court finds that the statute of limitations defense raised in defendants' motion for judgment N.O.V. is not well taken. The jury was fully instructed on the statute of limitations defense and on the fraudulent concealment issue involved therein. This Court is unwilling to disturb their findings in that regard.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that defendants' motion for a new trial and motion for judgment notwithstanding the verdict be, and the same hereby is, OVERRULED.

IT IS SO ORDERED.

/s/ (Illegible)
Sr. United States District Judge

Toledo, Ohio.

JUDGMENT IN COURT OF APPEALS

(March 15, 1984)

Nos. 80-3705, 81-3065,
81-3114, 81-3115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs-Appellees,
Cross-Appellants,

MACRITCHIE MATERIALS, INC.,
Proposed Intervenor,
Appellant, (81-3115)

v.

S. E. JOHNSON COMPANY, *et al.*,
Defendants-Appellants,
Cross-Appellees.

JUDGMENT

Before: LIVELY, *Chief Circuit Judge;* WELLFORD, *Circuit Judge;* and WILHOIT, *District Judge.*

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby vacated this case is remanded for retrial.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, *Clerk*

ORDER DENYING REHEARING

(July 3, 1984)

Nos. 80-3705, 81-3065
81-3114, 81-3115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC.,
Plaintiffs-Appellees, Cross-Appellants,

v.

S. E. JOHNSON COMPANY, *et al.*,
Defendants-Appellants, Cross-Appellees.

ORDER

Before: LIVELY and WELLFORD, *Circuit Judges*; WILHOIT, *District Judge.**

The court has considered the plaintiff-appellant's motion for an en banc hearing and has rejected the petition for this consideration.

The panel in this case has carefully considered the petition for a rehearing and we conclude that no further action should be taken under all the circumstances. Judge Wilhoit disagrees, and would grant the petition for reasons set forth in his dissenting opinion.

Accordingly, the motion for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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*The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

STATUTES INVOLVED

This antitrust case turns on the following statutes:

—Sherman Act: 15 U.S.C.

§ 1. Restraint of trade; penalty (1975)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 12, 1975, P. L. 94-145, § 2, 89 Stat. 801.)

§ 2. Monopolization; penalty (1974)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, § 3, 88 Stat. 1708.)

—Clayton Act: 15 U.S.C. § 18 (1950)

§ 18. Acquisition by one corporation of stock or assets of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the forma-

tion of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

* * * * *

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

* * * * *

(Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.)

No. 84-493

(3)

In the Supreme Court of the United States

October Term, 1984

Supreme Court, U.S
FILED
OCT 25 1984
ALEXANDER L. STEVAS
CLERK

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY
FRED R. CREAGER & SONS, INC.,
MATCO INC.,
OAMCO, INC.,
C. P. CALAWAY, INC.,
THE MAUMEE STONE COMPANY,
THE MICHIGAN STONE COMPANY,
WOLCOTTVILLE SAND & GRAVEL CORP. and
J. T. KIRKBY,
Petitioners,

VS.

ARTHUR S. LANGENDERFER, INC. and
NORTHERN OHIO ASPHALT PAVING CO.,
Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 28.1 STATEMENT

Material Suppliers of Northwest Ohio, Inc., an Ohio corporation, is a non-wholly owned subsidiary of Northern Ohio Asphalt Paving Co. MacRitchie Materials, Inc., the proposed intervenor below, is an affiliate of Respondent.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

On September 27, 1984, Respondents herein (Langenderfer) filed their own Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals to request review of its (2-1) decision vacating judgments of the District Court awarding treble damages and injunctive relief against Petitioners herein (Johnson). A retrial was ordered. Langenderfer's Petition is pending in this Court as Docket No. 84-508. Johnson, the prevailing party in the Court of Appeals, has also filed its own Petition for Certiorari pending herein as Docket No. 84-493. Thus, the anomalous posture of these proceedings is that both parties have sought review of the Court of Appeals' decision below. We vehemently agree with Johnson that the policy issues presented by both petitions for review are of extreme importance in the construction of the antitrust laws and that these questions should be resolved by this Court now rather than await the enormous expense, delay and injustice inherent in yet another monopoly trial and years of appeals. Johnson has illegally monopolized the Northwestern Ohio asphalt paving industry since 1972—it is time to put an end to it. We respectfully oppose Johnson's petition for certiorari on the grounds that it is inconsistent with the Court's long-standing adherence to the principle that the prevailing party in the Court of Appeals may not obtain review of a decision in its favor. *Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); Stern and Gressman, SUPREME COURT PRACTICE, § 2.4, pp. 58-59 (5th Ed. 1978)

We respectfully submit that Langenderfer's petition should be granted (Docket 84-508). The Sixth Circuit has created a legal *per se* rule in favor of an illegal monopolist. No court has gone so far. The case presents a unique opportunity for the Supreme Court to draw the ultimate boundary line beyond which a monopolist's conduct may not go. We also wish to correct misleading assertions contained in Johnson's petition which distort the evidence and findings below.

STATEMENT OF THE CASE

A full statement of the case is set forth in Langenderfer's Petition for Certiorari (Docket No. 84-508) at pp. 1-12 to which reference by incorporation is made. We note that Johnson's Petition continues to distort the record of the case below—principally to make out that Langenderfer's whole Sherman Act case was based solely on Johnson's predatory bidding. E.g., Johnson's Petition (p. 4) asserts that Langenderfer's claim of violation was that "Johnson combined and conspired to drive Langenderfer out of business by 'monopolistic and anticompetitive practices' *in bidding for the jobs in question.*" Although Johnson succeeded in misleading the majority of the Court of Appeals to treat this as a predatory pricing case instead of a monopoly case, we trust they will not be successful in doing so here. Predatory bidding was only one aspect of the case. The case was tried and submitted as a traditional monopoly case—Langenderfer claimed that Johnson restrained trade, monopolized, and attempted and conspired to monopolize the Northwestern Ohio asphalt paving industry. Predatory bidding was only *one* of twelve inter-related anticompetitive and monopolistic practices which were disclosed by the evidence and submitted to the

jury. Excerpts from the trial court's full-blown monopoly charge to the jury (Appendix A hereto) irrefutably demonstrate that the case was tried, submitted and decided as a *monoply* case.

What Langenderfer in fact alleged and what the trial court instructed the jury is that:

> "The plaintiffs allege that the defendants have violated the Federal antitrust laws by unreasonably restraining trade, monopolizing and conspiring, and attempting to monopolize, interstate trade and commerce in the asphalt paving industry." (App. A1).

After correctly charging the jury on the definitions of monopoly, monopoly power, monopolization, attempt to monopolize and the relevant market, the court submitted the twelve specific practices claimed by Langenderfer against Johnson which may be paraphrased as follows (App. A3-A5):

(1) Acquisition of the mix plants and businesses of five actual asphalt paving competitors;

(2) Acquisition of a large number of quarries and sand pits upon which remaining paving competitors were dependent for raw materials, resulting in Johnson's control and domination of highway construction materials, exclusive dealing and distortion of normal competitive conditions;

(3) Acquisition of a major bridge building company so as to package bids which other competitors had to sub-contract for;

(4) Selling stone and sand at monopolistic, predatory and unreasonably high prices to competitors;

(5) Refusing to sell sand on occasions to competitors;

(6) Intimidating or discouraging competitors from building their own asphalt plants or bidding against Johnson on high tonnage jobs while threatening to run them out of business, withhold essential stone or sand, undercut them in local market areas or otherwise leveraging Johnson's power in one market to control or suppress competition in another;

(7) Predatory pricing of bids for highway contracts with prior knowledge of Langenderfer's or other competitors' paving costs;

(8) Forcing Langenderfer and other paving competitors to lose highway contracts to Johnson or take them at a loss or marginal profits by bidding at unreasonably low figures, relying on excessive profits made by its quarry operations from the sale of road building materials to Langenderfer and others to produce an overall profit;

(9) Subsidizing Johnson's predatory bidding of paving operations by profits and leverage realized from monopolizing the sale of stone and sand;

(10) Aggravating the effects of these practices by charging quarry operations with costs properly allocable to paving operations;

(11) Forcing out of business, preventing, discouraging or buying up new or other sources of stone and sand which would have been competitive with those already controlled by Johnson; and

(12) Suppressing and restraining actual and potential competition by the sheer size and dominance of the financial and physical resources of the combined and affiliated Johnson companies and the economic leverage that their total integrated operations afforded.

This was the compendium of monopolistic and anticompetitive practices submitted to the jury in support of Langenderfer's Sherman §2 claim, not just predatory bidding. It was proper to submit all these practices to the jury as part of a total monopolization claim because "in cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.' " *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698 (1962). "Plaintiff's evidence should be viewed as a whole. Each of the 'six things' [anticompetitive acts] viewed in isolation need not be supported by sufficient evidence to amount to a §2 violation. It is enough that taken together they are sufficient to prove the monopolization claim." *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522, n.18 (10th Cir. 1984).

If Johnson's predatory bidding practices were the point of the spear that entered the wound, it was the shaft and thrust of illegally-acquired monopoly power that supplied the force and leverage for the fatal blow. So it was that the dissenting judge found that "[t]he alleged predatory pricing in this case was nothing more than a manifestation of Johnson's monopoly power." 729 F.2d at 1061. Even the Sixth Circuit majority found that Johnson had created a "monopolistic market structure" and "intended to eliminate competition and dominate the market." 729 F.2d at 1054. That being true, a violation of Sherman §2 should have been found by the Sixth Circuit whether or not Johnson's bidding practices were unlawful or innocent standing alone since they were part and parcel of the whole monopolistic scheme comprising the twelve monop-

olistic practices. In short, by accepting Johnson's theory of appeal, the Sixth Circuit majority opinion allowed the "predatory pricing" tail to wag the "monopoly" dog.

Johnson's petition (p. 6) grossly misrepresents that the trial court held that the other eleven anticompetitive practices alleged against Johnson "were not specifically proved, however, by evidence at trial." This distortion is immediately evident from a reading of the trial court's opinion upon its granting of broad injunctive relief against Johnson (See Langenderfer's Petition A40-45). The trial court found that "at a minimum, plaintiffs are entitled to an injunction which would prevent defendants from a continuation of those anticompetitive practices clearly shown by the evidence at the March, 1980 trial on the merits." (*Id.* A40). Thus, the trial court clearly found that Johnson's acquisitions were anticompetitive and enjoined Johnson "from acquiring any limestone quarries, sand or gravel pits, asphalt plants or other paving companies within the next ten (10) years" without the court's consent. "Another injunction fully warranted by the evidence adduced at trial is a prohibition against the defendants' practice of intimidating, threatening or discouraging plaintiffs or other competitors from building their own asphalt plants or from bidding certain kinds of state work." (*Id.* A41-42). As to bidding practices, the trial court stated as follows (*Id.* A42-43):

> "Finally, this Court feels that the evidence at trial justifies some injunctive relief in connection with the bidding practices of the defendants. The major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding on ODOT and OTC projects. At trial, plaintiffs vigorously attempted to show how defendants deliberately excluded competition by bidding low and deliberately sacrificing short term profits for the purpose of driving rivals out of business.

While plaintiffs' evidence at trial showed that the defendants' bids were often below plaintiffs' costs, any evidence of defendants' bids below its *own* costs was scarce. There was some testimony by Howard A. Shank, defendants' Vice President and chief estimator, that he bid below cost and overhead only on specific items in preparing a bid on OTC and ODOT projects. Transcript pp. 648-710. Nonetheless, this Court feels that it would [be] appropriate to include an order prohibiting defendants from bidding below their own costs on ODOT and OTC projects."

As to price discrimination, refusals to deal and tying, the trial court stated as follows (*Id.* A44-45):

"In the present case, this Court finds that the *International Salt* line of cases justifies the issuance of injunctions in the areas of price discrimination, refusals to deal, and tying arrangements in the asphalt paving industry in northwestern Ohio. There was no hard evidence at trial establishing that defendants had actually engaged in these specific practices. However, the evidence at trial did establish that the defendants possessed strong control over raw material sources (i.e. sand and gravel pits) in northwestern Ohio.

This Court senses, and the evidence at trial implied, that this type of control over raw materials could lead to the types of abusive practices sought to be enjoined by plaintiffs and which are already prohibited by the antitrust laws. Thus, under the doctrine of *International Salt*, this Court finds that it will exercise its equitable powers to prohibit the defendants from engaging in practices of price discrimination, refusals to deal and tying arrangements."

Thus, the representation in Johnson's Petition that practices other than predatory bidding were not actually proved at trial is grossly misleading. Whether or not there is hard, soft or scarce evidence of other patently illegal practices such as price discrimination, refusals to deal and tying is beside the point because Langenderfer's evidence should be viewed "as a whole. Each of the '[twelve] things' viewed in isolation need not be supported by sufficient evidence to amount to a §2 violation. It is enough that taken together they are sufficient to prove the monopolization claim." *Aspen Highlands, supra* at 1522. The episodes of price discrimination, refusals to deal and tying "may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute [§2] forbids, they come within its prohibition," *American Tobacco Co. v. United States,* 328 U.S. 781, 809 (1946). Obviously, the district court found that Johnson's total conduct amounted to a violation of the Sherman Act because it upheld the jury verdict, denied Johnson's post-trial motions, and enjoined future anticompetitive practices clearly shown by the evidence at trial. It is inexcusable for Johnson to represent that "Langenderfer's theory of Sherman Act liability turned on its claim of 'predatory pricing' " and that the trial court found "that Langenderfer's other claims of antitrust violation 'were not specifically proven by evidence at trial' . . ." (Johnson's Petition, p. 14).

One other point in Johnson's Statement of the Case deserves response. Johnson states that "never before has the cry been heard that alleged monopoly has made prices —not too high—but, as here, *too low.*" Like many other statements in Johnson's Petition, this gratuitous comment does not hold water. Predatory pricing by a monopolist (where prices are too low—not too high) has been

recognized and condemned as a violation of Sherman §2 as early as the landmark case of *United States v. The Standard Oil Company,* 221 U.S. 1, 43 (1911) ("unfair methods of competition, such as local price cutting at the points where necessary to suppress competition"). See also *Schine Chain Theatres v. United States,* 334 U.S. 110, 120 (1948) ("price cutting . . . may be the instrument of monopoly power to eliminate competitors or to bring them to their knees"); and *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 696, n.12 (1967) (" 'the decisions of the federal courts in primary-line-competition cases . . . consistently emphasize the unreasonably low prices and the predatory intent of the defendants.' ")

REASONS FOR REVIEW

We agree with Johnson's petition when it states this Court should review this case because: "Nothing remains to be tried." This Court should grant review based on Langenderfer's Petition for Certiorari (Dkt. No. 84-508), reverse the Sixth Circuit and reinstate the jury verdict and trial judgments in Langenderfer's favor—then the case *will be final.* This protracted litigation will at last be over and competition hopefully restored in Northwestern Ohio.

As Langenderfer's Petition describes, the present case presents the classic basis for granting a Petition for a Writ of Certiorari (resolution of a direct conflict in the Circuit Courts) as well as an important question of antitrust law which threatens the effectiveness of future private enforcement. *See, e.g., Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557, 559 (1968) (certiorari granted to resolve direct conflict between decisions of federal courts of appeal); *Albrecht v. Herald Company,* 390 U.S. 145, 146 (1968), *rehearing denied,* 390 U.S. 1018 (1969) (certiorari granted

to resolve "important issues" of federal antitrust law); *Perma Life Mufflers v. International Parts Corporation*, 392 U.S. 134, 136 (1968) (certiorari granted to resolve an issue which "threaten[ed] the effectiveness" of private antitrust suits).

In deciding whether to grant certiorari the question is not one of strict finality below, but whether the issues presented by the Petition are fundamental to the further conduct of the case. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (certiorari granted, despite remand, because issue presented "is fundamental to the further conduct of this case."). *See also, Land v. Dollar*, 330 U.S. 731, 734, n.2 (1947) ("[A]lthough the judgment below was not a final one [but involved a remand], we consider it appropriate for review", citing *U.S. v. General Motors Corp., supra*); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949) (review granted despite remand on the basis of *Land v. Dollar, supra*). Clearly, this matter meets the *General Motors* standard: review of the questions presented in Langenderfer's Petition, on which the Circuits are sharply divided is fundamental to the further conduct of this protracted case.

If, on retrial, the critical rulings of the Sixth Circuit majority (a monopolist's limit pricing strategy is legal *per se* regardless of anticompetitive intent and effect; acquired asphalt paving competitors are not "in commerce" under Clayton §7; and there is no jurisdiction to divest the monopoly) are followed by the district court so as to exclude or limit evidence, instruct the jury, or bar claims and remedies, as a matter of law, and it turns out on the next appeal that the original rulings to which the trial court adhered were in error, the only recourse may yet be a third trial and a third round of appeals. Without review by this Court, the posture in which the Sixth Circuit has

left this case, totally frustrates a trial court's ability to do justice between these parties without substantial risk of further error and additional appellate review. The questions presented are truly "fundamental to the further conduct of the case" and its expeditious and just disposition. On the other hand, if the Sixth Circuit is now found to be in error, the case is over and the result is final.

In deciding whether to grant certiorari the practical considerations of the courts in asserting jurisdiction under 28 U.S.C. § 1291 are analogous. Where finality is at issue, the most important competing considerations are "the inconvenience and costs of piece-meal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Both parties herein agree that further delay of review in this case will result in outrageous expense, unnecessary expenditure of judicial effort and a gross miscarriage of justice. Consider only the following facts. Johnson has been monopolizing the Northwestern Ohio paving industry since at least 1972; suit was filed in 1976; Johnson illegally ran Langenderfer out of business in 1978; the jury and trial court so found in March of 1980; on appeal, the Sixth Circuit denied Langenderfer's motion for an expedited hearing without explanation, heard argument in October, 1982 and finally decided the case in March, 1984, four years after judgment; it wiped out the treble damage judgment and even the injunction against "anticompetitive practices clearly shown at the March, 1980 trial" and ordered an expensive retrial that may take several years of further appeals. At this point, Johnson has been monopolizing the market for at least twelve years with no relief in sight—we are back to square one, if the Sixth Circuit decision stands. With the injunction expunged, Johnson is free to resume its monop-

olistic practices. Langenderfer, and the handful of competitors remaining in Northwestern Ohio, you can be sure, fully understand the axiom "Justice delayed is justice denied." It isn't as if the Sixth Circuit didn't know what it was doing. The majority found that Johnson created a "monopolistic market structure" and "intended to eliminate competition and dominate the market." 729 F.2d 1054. Despite that we have to go back and do it all over again. This protracted burden and expense on a "private attorney general" is too much to ask even though these "private actions brought by members of the public in their capacities as investors or competitors, which incidentally benefit the general public interest, perform a vital public service." *Gulf & Western Industries v. Great A&P Tea Co.*, 476 F.2d 687, 699 (2d Cir. 1973). Langenderfer was driven from business in 1978; it cannot afford this endless round of trials and appeals to achieve justice and "perform a vital public service." All the while Johnson continues its domination of the market even now free from the injunction against its monopolistic practices. We know from the record in this case that the monopolist can well afford the delay and expense its ill-gotten position supports—Langenderfer cannot.* It has already been worn down by the enormous expense and delay of this litigation, all of which serves the monopolist well. Langenderfer's only hope is that this Supreme Court grants certiorari and reviews what has happened below. To deny certiorari in this case to Langenderfer for lack of finality or a fundamental issue would mock the very system of justice we are attempting to serve.

One further piece of evidence illustrates what Langenderfer and Johnson's other competitors are up against

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*Johnson's net worth by 1978 was $21 *million* (up 136%)—Langenderfer's was $305,000 (down 80%) after eight years of operating losses (PX 108, AIII 95).

if review is delayed. Johnson has gratuitously accused Langenderfer of abusing the judicial process—of spuriously usurping the energies of the judicial system by even bringing this suit (Johnson Petition, pp. 12-13). This would be amusing if we had the heart to laugh and the charge was not another stunning piece of evidence to show the total arrogance of Johnson's monopoly power, and its perverse willingness to crow over its fallen victims. Here is a party who, without an ounce of remorse, has created a monopolistic market structure with intent to exclude competition and dominate the market; who has been found liable by a district court and jury of numerous violations of the antitrust laws; who controls up to 75-80% of the market; who bids at no profit "just to see how tough the competition is"; who boasts of low bidding to keep competition out of his area; who has intimidated and coerced its competition by express threats to put them out of business or cut off their raw materials if they competed with him; who has made good on those threats by running Langenderfer and others out of business or out of the market; who has committed almost every common garden variety antitrust violation in the book; who on the eve of a monopoly trial challenging its eleven anticompetitive acquisitions thumbs its nose at the proceedings and makes its biggest acquisition yet (Union Quarries) for $3.5 million cash. This party, who, in an earlier day, might be charged with criminal violations of the Sherman Act, is so bereft of human decency as to come before the Supreme Court of the United States and tell that Court with a straight face that *Langenderfer* has abused the judicial process. What mercy are Langenderfer and other competitors to expect from such a party pending the next trial and another round of appeals now that the trial court's injunction has been erased without comment by the Sixth Circuit?

I. BIDDING MARGINALLY OVER TOTAL COSTS (LIMIT PRICING) BY A MONOPOLIST SHOULD NOT BE LEGAL PER SE WHERE THE DELIBERATE INTENT AND EFFECT IS TO EXCLUDE COMPETITION AND MAINTAIN THE MONOPOLY.

We will not repeat here the important and compelling reasons (including the conflicts among the Circuits) for granting Langenderfer's Petition for a writ of certiorari or the legal analysis in support of the foregoing proposition. We incorporate by reference those portions of Langenderfer's Petition (Dkt. 84-508 at pp. 12-28).

We are not confronted here with the situation prevalent in so many other "predatory pricing" cases where plaintiffs attempt to make out a claim of illegal pricing *solely from the pricing practices themselves without direct evidence of predatory intent.* Here we have unrebutted evidence as the Sixth Circuit found that Johnson through its acquisitions created a "monopolistic market structure" and "intended to eliminate competition and dominate the market." Its massive market shares (75% Turnpike and up to 82.5% ODOT) and ability to underbid everybody else's costs by 5% to 10% is unmistakable evidence of monopoly power attained by these ill-gotten acquisitions and other reprehensible practices. No further evidence or a new trial is required to show a violation of Sherman §2.

Again we must take issue with Johnson's Petition (p. 13) where they attempt to "characterize" Langenderfer's charges. Yes, we agree Johnson submitted "unreasonably low" bids to public authorities. But that is not all it did. It almost always bid specific line items which they monopolized below their costs. There were at least two episodes of major bids to ODOT and OTC where Johnson, on its own papers, admittedly bid below its own

total costs. The Sixth Circuit was obviously mistaken and misinformed when it relied on Johnson's appellate representations that it *never* submitted a bid at less than cost (See Langenderfer's Petition, p. 20, n.9.).

Secondly, Johnson's CEO, Kirkby himself, admitted under oath that he bid at his cost or zero profit against Langenderfer and Miller "just to see how tough his competition is." (AII 609-10). He found out—Langenderfer went out of business after eight years of operating losses; Modern Construction quit asphalt paving; three small competitors gave up bidding against Johnson; and five competitors removed their plants and left the area. This sworn statement came from a man who privately admitted "that he did not like Langenderfer or Miller (another competitor) and wanted to run them out of business." 729 F.2d at 1054. He never denied either of these statements in court. "Predatory pricing differs from healthy competitive pricing in its motive: a predator by his pricing practices seeks 'to impose losses on other firms, not garner gains for itself.'" *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853-54 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981). Kirkby himself has provided the classic direct evidence by which all predatory pricing intent can be hereafter judged.

Thirdly, for over six years Johnson bid 5% to 10% below all its competitors' costs when it won the bid; when somebody else won the bid the winning bid was 1% to 3.7% below the next closest bidder (AI 466-67, AIII 55, PX 75). What this means is this: Johnson knew from the detailed public bid tabulations that it was beating its competition by 5% to 10% more than was necessary to get the job. Why did Johnson year after year "leave money on the table" when it could have won the jobs anyway by bidding at least 5% higher? Kirkby said he did so to remain dominant and keep competition

out of the area and to make sure Langenderfer and Miller didn't get any jobs (AI 564, AI 617-18). In other words, Kirkby was content to give up profits that were there for the taking in order to rub his competitors' noses in it—to show them they didn't have a chance and might as well give up. They did. That is monopoly power at work; it is also "predatory" bidding or the English language has lost its meaning.

Johnson pretends that "the bids are secret. No one knows who will be low bidder until the bids are publicly opened." (Johnson's Petition, p. 13). No knowledgeable person believes this—least of all Johnson. Johnson knows just as well as its competitors what their bids have to be. Why? First, Johnson sells them the stone or sand they need to bid the job. That is the major cost on a job. Even if Johnson doesn't sell them, France does, and the stone prices are high, fixed and identical to Johnson's list prices (AI 105-109; AII 743-44). Secondly, Johnson's estimator notes on his bid sheets exactly how many miles each competitor's plant is from the job and the cost of hauling and laying asphalt is common knowledge as a result of union scale specified by the State (AII 1056-57). In other words, evidence showed that Johnson knew exactly what its competitors' costs were and knew how much to bid to whip them. After each public bid, a bid tabulation for each job showed what each competitor bid per line item as further verification of their costs.

Finally, Johnson argues that there is something sacred about public bidding—that the object of public bidding is the lowest price. Now if that be so, then bidding *below cost* would be approved since the public benefits short term from the lowest price—no matter what. But below-cost pricing is everywhere condemned as illegal and

monopolistic because it discloses a predatory intent to injure competition. Johnson's motive was no different when it gave up profits it could have had for the asking just to see how tough the competition was.

Johnson's argument is totally devoid of any authorities other than the Sixth Circuit opinion itself to support the decision below. There is no just reason to further delay review of Johnson's monopolistic and predatory conduct.

II. SECTION 7 OF THE CLAYTON ACT WAS VIOLATED BY JOHNSON'S ACQUISITIONS WHICH CAUSED INJURY TO LANGENDERFER.

Johnson's Petition (p. 15) suggests that Langenderfer's business "died by its own hand" because as:

> "The Court of Appeals explained: 'Langenderfer did not diversity [sic] its operations, but remained an asphalt paving specialist.' 729 F.2d at 1053."

It is true that the Sixth Circuit made this statement but it is totally without foundation in the record and Johnson knows it. In the very next line, the Sixth Circuit mentions that Langenderfer and its sister companies, NOAP and MacRitchie Materials, controlled a quarry, had four batch plants and a paving business. 729 F.2d at 1053. Langenderfer was fully-integrated but this did not prevent it from being run out of business by Johnson. Johnson's Petition (pp. 6-7) spends two pages describing its twelve acquisitions in innocent colors. It conspicuously fails to mention that some of the quarries and all of the asphalt pavers (except one) were acquired under anti-competitive circumstances and that Johnson insisted on non-competitive covenants from the sellers (729 F.2d 1053-54; AII 1009-1015). Agreements not to compete may be wholly innocent under some circumstances but, in other circum-

stances, they may also be used (as they were here) to expand a monopoly and restrain competition. *See Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948):

> "We reach the same result as respects the agreements not to compete which Schine exacted from competitors whom it bought out. It is not enough that the agreements may be valid under local law. Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce. Agreements not to compete have at times been used for that unlawful purpose. See United States v. American Tobacco Co. 221 US 106, 174, 55 L ed 663, 691, 31 S Ct 632; United States v. Crescent Amusement Co. supra (323 US p 181, 89 L ed 167, 65 S Ct 254). If we had here only agreements not to compete, the inferences drawn by the District Court might not be warranted. But in the setting of this record, and against the background of Schine's other monopolistic practices it seems to us that the District Court might infer that the requisite purpose was present and that these agreements were additional weapons in Schine's arsenal of power through the use of which its monopoly was sought to be extended."

Whether or not Johnson's labored attempt to portray its twelve acquisitions as business-as-usual diversification is not the point. The crux of the matter is that even the Sixth Circuit majority found that, based on the evidence, Johnson had created a monopoly and "intended to eliminate competition and dominate the market."

> "Langenderfer presented expert testimony from several economists to the effect that Johnson's acquisitions significantly reduced competition and increased market concentration, thereby creating a monopolistic market structure. Statistical evidence does

support this testimony. Defendants' average annual share of ODOT and OTC projects from 1966-1971 was 46.9%, but they took well over half of the available work during the 1972-78 period.[6] Johnson Companies did 75.8% of all turnpike paving in northwest Ohio during this period. 729 F.2d at 1054.

6. Defendants' annual shares of the relevant ODOT and OTC projects were as follows: 1972—65.3%; 1973—57.6%; 1974—82.5%; 1975—53.2%; 1976—62.6%; 1977—70.4%; 1978—51.3%."

Johnson spends pages 18 and 19 of its Petition arguing the sufficiency of the evidence (which we thought the jury had resolved against them) and claiming that Langenderfer really went out of business simply because Johnson was inherently more efficient than Langenderfer rather than because Johnson monopolized the market.* The trial court dealt with that in sustaining the jury verdict (Langenderfer's Petition, A29):

"As a second reason in support of its motion, defendants contend that plaintiffs failed to establish that defendant's anticompetitive practices were the proximate cause of Langenderfer's demise as an asphalt paving contractor. Defendants urge that plaintiff's downfall was caused, in part, by a declining market for ODOT and OTC work. At trial, defendants also cited many other factors which could affect the profitability of a company. Defendants suggested to the jury that plaintiff's own inefficiency, rather than the bidding practices of the defendants, caused injury to the plaintiffs.

---

*Nobody made money but Johnson. By 1978, 5 competitors had losses, 3 had slight increases. The combined competitors totalled net *losses* of $378,000 in 1975; $706,000 in 1976; and $161,000 in 1978. Johnson made $2.7 million profit in 1978 (AII 645-47, AIII 102-03, PX 115-116).

> The question of causation of plaintiff's injuries is a question of fact for the jury to resolve. *Costner v. Blount Nat'l. Bank of Maryville, Tennessee,* 578 F. 2d 1192, 1195 (6th Cir. 1978). Defendants made many of these same causation arguments to the jury during closing arguments. Upon considering all the evidence, the jury resolved the causation question in favor of the plaintiffs under proper instructions."

It is too late for Johnson to try to persuade the Supreme Court that the jury was wrong on the weight of the evidence. As this Court stated in *United States v. Johnston,* 268 U.S. 220, 227 (1925), "We do not grant a certiorari to review evidence and discuss specific facts." Moreover,

> "On appeal . . . the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify." *Continental Ore, supra* at 696, n.6.

It is, however, interesting to note that Johnson doesn't deny that its acquisitions were substantive anti-competitive violations of Clayton §7. Instead, it argues that Langenderfer couldn't have been hurt by the Union Quarries' acquisition in 1979 because Langenderfer already went out of business in 1978. It takes colossal gall to argue that Langenderfer has no standing to complain of this acquisition because Johnson had already driven Langenderfer out of business. The logical conclusion of Johnson's thesis is that the sooner all of its competitors are driven out of business, the sooner no one will have any right to complain about these acquisitions. To be sure, when Johnson has 100% of the market there will be no one left to be injured. In any event, the trial court, in granting Langenderfer injunctive relief, rejected Johnson's proposition, finding "that the plaintiffs [Langenderfer] have demonstrated

that the defendants' [Johnson] continued activities threaten injury to the plaintiffs' status as a potential competitor as well as to plaintiffs' residual business in the asphalt paving industry." (Langenderfer's Petition A39-40).

Although by now, the pattern is fairly clear, one final distortion of the record perhaps requires correction. Johnson's Petition (p. 19) claims there was no evidence to support Langenderfer's claim that Johnson's monopolistic stone and sand prices subsidized its low-ball bidding of paving contracts. Then, Johnson has the effrontery to quote the trial court out-of-context to the effect: "There was no hard evidence at trial establishing the defendants engaged in these specific practices." The specific practices the trial court was expressly referring to, as a simple reading of its opinion makes clear (Langenderfer Petition, A44), were price discrimination, refusals to deal and tying, *not* profit squeezing or cross-subsidization as Johnson suggests. In fact, the trial court expressly found that (*Id.*, A41 [Emphasis added]): "Defendants' market shares were also a result of their superior vertical integration, i.e., their ownership of stone and sand pits *which enabled the defendants to bid low on asphalt paving work while charging higher prices to competitors for raw materials.*" Both of Langenderfer's expert economists testified at length that these practices of Johnson were profit squeezing and cross-subsidization, yet another form of predatory conduct (AII 778-781; 673-79). Such practices are obviously illegal. "It is clear that a firm may not employ its market position as a lever to create—or attempt to create—a monopoly in another market . . . the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of §2, even if there has been an attempt to monopolize the second market." *Berkey Photo, Inc. v.*

Eastman Kodak Co., 603 F.2d 263, 275-76 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

When Johnson charged its smaller non-integrated competitors monopolistic prices for the very stone and sand they needed to compete (Langenderfer Petition, p. 7) and then turned around and bid below those competitors' costs by more than 5-10% on the paving jobs, it was no wonder they gave up even bidding against Johnson. It was all summed up by one competitor (Sader) who testified that Johnson "bid cheaper than I can buy the material." (AI 444). Not content with that advantage, Sader was told by Kirkby not to bid Johnson's state work and was warned that Johnson wouldn't even supply him stone if he built his own asphalt plant (AI 435-439).

Finally, Johnson claims (Johnson Petition, p. 18) it was "acquitted" of any Clayton Act violation by the Sixth Circuit on its twelve acquisitions except Union Quarries. It is singularly appropriate, and probably of interest to Freudian scholars, that Johnson chose the word "acquitted," more suitable for criminal conduct than civil. Nevertheless, it was "acquitted" by the Sixth Circuit solely on the ground that the acquired asphalt paving companies engaged in construction and repair and interstate highways were not engaged in interstate commerce within the meaning of Section 7 of the Clayton Act. Thus, it was a jurisdictional technicality not a substantive legal innocence that exonerated Johnson. Langenderfer's Petition, pp. 26-28, challenges the Sixth Circuit ruling on that point.

CONCLUSION

We agree with the conclusion of Johnson's Petition (p. 21): "This Court should not send this case back for another month of trial and no one knows how many [years of] appeals thereafter." The case was well and truly tried; the record is complete; the vacation and remand by the Sixth Circuit without review by this Court threatens irremediable hardship, expense, delay and wasted legal effort. Justice will not be served by postponing answers to the vital and fundamental questions posed herein and putting the parties through additional years of litigation, while Johnson continues to reap the fruits of the monopolistic market it has created.

The Sixth Circuit has created a legal per se rule in favor of a monopolist's limit pricing strategy which was adopted with intent "to eliminate competition and dominate the market." The rule ignores motive or intent and market impact. In the words of the dissenting judge, it "create[s] a 'free zone' in which monopolists can exploit their power without fear of Sherman Act scrutiny or sanctions." This case presents a unique opportunity for the Supreme Court to draw a bright line at one end of the predatory pricing spectrum beyond which courts and monopolists clearly may not go. There will never be a purer record for such a purpose.

Again, we agree with Johnson that the legal issues presented by this case (other than Johnson's complaint about the sufficiency of the evidence) merit and require this Court's attention. However, because Johnson as the prevailing party in the Court of Appeals, lacks standing to raise the issues, we respectfully submit that it would be appropriate for the Court to deny Johnson's Petition

and to grant Langenderfer's Petition for Certiorari (Docket 84-508) as the proper vehicle for resolving these issues and thereupon set this case for full briefing and review.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM THE TRIAL COURT'S MONOPOLY CHARGE TO THE JURY (AII 1103-1108)

* * * * *

The plaintiffs allege that the defendants have violated the Federal antitrust laws by unreasonably restraining trade, monopolizing, and conspiring, and attempting to monopolize, interstate trade and commerce in the asphalt paving industry.

* * * * *

The term "monopolize", as used in the Federal antitrust laws, means the power either to obtain, or to maintain, the power to remove or exclude competitors from the field of competition in a particular business or industry.

In this case the defendants have monopolized, within the meaning of the antitrust laws, if it appears from a preponderance of the evidence in this case: (1) that they have knowingly combined or conspired either to obtain, or to maintain, the power either to remove, or to exclude or keep out, competitors from the field of **[2462]** competition;

(2) that they posses the necessary power to remove or exclude; and

(3) that they have the intent o exercise their power to remove or exclude.

Of course, if the power to remove or exclude competitors has been exercised, and if as a result of the exercise of such power one or more competitors has been re-

moved or excluded, some actual monopolization has already occurred; but it is not necessary that competitors actually be removed or excluded from the field of competition, before a combination or conspiracy can be found to have monopolized.

Monopolization may be found to exist whenever it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in effect occurred.

The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was wilfully and intentionally acquired and maintained. A **[2463]** person who acquires monopoly power though normal growth and development, as a consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge. Even under these circumstances, the defendants still may be found to have violated Section 2 of the Sherman Antitrust Act. If such a monopolist abuses his monopoly power and acts in an unreasonably exclusionary manner toward his competitors or potential competitors, then Section 2 of the Sherman Antitrust Act is violated.

* * * * *

There are four essential elements which the plaintiff must prove in order to establish its claim that the defendant has monopolized within the meaning of the antitrust laws:

First: That a relevant market applicable to this claim is what plaintiff claims it to be as follows: the bidding on and award of asphalt paving work on Ohio Department of Transportation (hereinafter abbrevated ODOT) highways and work on the Ohio Turnpike (hereinafter abbreviated OTC) in the Northwestern corner of the State of

Ohio, composed of the following thirteen counties, to-wit: Williams, Defiance, Paulding, Fulton, Henry, Putnam, **[2466]** Lucas, Wood, Hancock, Ottawa, Sandusky, Seneca and Wyandott.

Second: That if so, the defendants possessed monopoly power in that market;

Third: That if so, the defendants did one or more of the acts claimed by the plaintiffs in their complaint, to-wit:

(1) Acquisition of asphalt mix plants and the businesses of defendants Ohio Engineering and Creager, and the capital stock and/or assets of Price Asphalt Paving Company, Northwest Materials, Inc., and Union Quarries Co., all of which are competing asphalt paving contractors in Northwestern Ohio prior to their acquisition by the Johnson Company;

(2) Acquisition of a large number of sand pits and stone quarries in and near Northwestern Ohio, including sand pits and stone quarries on which plaintiffs and other competing highway paving contractors were dependent as sources of supply, with the result that defendants control the dominant source of highway construction materials in Northwestern Ohio, and in many locations, said acquired sand pits and stone quarries **[2467]** are the only economically located source of such materials for highway construction and repair purposes in northwestern Ohio, all of which results in exclusive dealing and distortion of normal competitive conditions;

(3) Acquisition of defendant Calaway, a major bridge building company in Northwestern Ohio, enabling defendant Johnson Company and its subsidiaries to package bridge construction and asphalt paving work and thereby

underbid plaintiffs and other asphalt paving competitors who had to subcontract bridge work;

(4) Selling stone and sand at monopolistic, predatory and unreasonably high prices to plaintiffs and other paving contractors thereby overcharging said parties for stone and sand used in the construction and repair of interstate highways;

(5) Refusing to sell sand on occasion to plaintiffs and other paving contractors and using same exclusively for defendants' purposes so that plaintiffs and other paving contractors had to haul sand from Michigan **[2468]** at greater expense;

(6) Intimidating or discouraging competitors from building their own asphalt plants or bidding against defendants in certain markets on high tonnage jobs threatening to run them out of business, withhold essential stone or sand, undercut them in their local market areas or otherwise leveraging defendants' power in one market to control or suppress competition in another;

(7) Predatory pricing of bids for highway construction and repair contracts to exclude competition with prior knowledge of plaintiffs' and other competing paving contractors' costs;

(8) Forcing plaintiff Langenderfer and other competing paving contractors either to lose highway contracts to defendants, or to take them at a loss or marginal profits, by causing defendant paving contractors to submit contract bids at unreasonably low figures, relying on the excessive profits made by other defendants from the sale of highway construction materials to defendant paving contractors, plaintiffs, or other paving contractors, to produce an overall profit to **[2469]** defendants from the projects;

(9) Subsidizing the predatory bidding practices and operations of defendant paving contractors by the profits and leverage realized from monopolizing or combining, conspiring or attempting to monopolize the production and sale of stone and sand and the prices realized therefrom;

(10) Aggravating still further the effects of these practices by charging to defendants engaged in selling highway construction materials, costs properly allocable to the defendant paving contractors;

(11) Forcing out of business, preventing, discouraging or buying up new or other sources of stone and sand which would have been competitive with those controlled by defendants; and

(12) Suppressing and restraining actual and potential competition by the sheer size and dominance of the financial and physical resources of the combined and affiliated defendant companies and the economic leverage that their integrated operations afforded; **[2470]** and thereby monopolized that market;

Fourth: That if so, such monopolization directly and proximately caused damage to the business or property of plaintiffs.

The burden is upon the plaintiffs to establish each of these four elements by a preponderance of the evidence in the case, although not necessarily to establish every item one through twelve above.

* * * * *

No. 84-493

Supreme Court, U.S.
FILED
NOV 8 1984
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CLERK

In the Supreme Court of the United States

October Term, 1984

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY,
FRED R. CREAGER & SONS, INC.,
MATCO, INC.,
OAMCO, INC.,
C. P. CALAWAY, INC.,
THE MAUMEE STONE COMPANY,
THE MICHIGAN STONE COMPANY,
WOLCOTTVILLE SAND & GRAVEL CORP. and
J. T. KIRKBY,
Petitioners,

vs.

ARTHUR S. LANGENDERFER, INC. and
NORTHERN OHIO ASPHALT PAVING CO.,
Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHNSON REPLY TO LANGENDERFER OPPOSITION

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JOHNSON REPLY TO LANGENDERFER OPPOSITION

Langenderfer, opposing Johnson's Petition for Certiorari, nimbly changes the subject.

1. Predatory Pricing Was Claim Upon the Trial

"Predatory pricing," the centerpiece of the trial, Langenderfer now replaces. It says (pp.2, 3) "The case was tried and submitted as a traditional monopoly case"—not as a "predatory pricing" case. Indeed, it is "inexcusable," Langenderfer says (p.8), for Johnson to say Langenderfer's case "turned on its claim of 'predatory pricing' * * *."

The District Court, listening to a month of trial, found:

> "The major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding on ODOT and OTC projects." (Appendix to Langenderfer Petition in No. 84-508, A42.)

The Court of Appeals emerged from its study of the record with the understanding that the evidence "clearly focused on the claim of predatory pricing." 729 F.2d at 1055. Langenderfer's "theory at trial (and in this appeal) was that defendants [Johnson] intentionally and consistently bid below the cost level of smaller competitors." 729 F.2d at 1056.

Now, to show its claim was (p.2) really "a traditional monopoly case," and not, as the courts below understood, a "predatory pricing" case, Langenderfer (pp.3-4) lists "twelve specific practices" on which it plants its case.

2. Monopoly Charges Now Urged Are Unsupported

Langenderfer has not noticed that its baker's dozen is made up of charges (a) ruled against it for want of support in the record, (b) on which the Court of Appeals held a verdict should have been directed in favor of John-

son, (c) on others which the trial court withdrew from the jury, and (d) on yet others as to which evidence was "scarce" or nonexistent. The documentation is in the Johnson reply in companion case No. 84-508, pp.4-7.

Specifically, of the "anti-competitive acts" Langenderfer lists:

> Four (items 1, 2, 3, 11) are based on Johnson's acquisition of 12 properties over a period of 19 years. The Court of Appeals held the trial court should have directed a verdict in favor of Johnson on *all* of these, save only the last. Langenderfer says (p.22) this was a mere "technicality." Whether "technicality" or not, the result is they were found not to be violations.
>
> Two charges (items 4 and 9) are that Johnson sold stone and sand at "unreasonably high" prices. The trial court withdrew this charge from the jury. Langenderfer never bought from a Johnson Company except when it offered the lowest price.
>
> One charge (item 5) claims Johnson refused to sell stone and sand to competitors. One instance is claimed. It occurred *before* Johnson acquired the property.
>
> One charge (item 6) claims threats—not acts.
>
> One charge (item 10) is that Johnson charged quarry operations with costs attributable to paving. This charge never surfaced in any brief until it appeared in the very last brief filed by Langenderfer in this Court. It has no support.

One charge (item 12) alleges "sheer size"—which has never been held a violation.

Two claims (items 7 and 8) charge "predatory pricing."

Langenderfer's case thus comes back to what it was on the trial—"predatory pricing," a proposition that has no place in the context of statutorily required competitive public bidding, where, as the Court of Appeals found, "Johnson never bid below its own cost * * *." 729 F.2d at 1056.

To shore up its new-found theory, Langenderfer says the trial court enjoined some of these anti-competitive acts.

3. Injunction, Erroneously Granted, Was Properly Vacated on Appeal

The argument concerning the injunction is pure sleight-of-hand.

The trial court did grant an injunction, even though it found the asserted anticompetitive acts "were not specifically proven by evidence at trial." (Appendix to Langenderfer Petition in No. 84-508, A43.)

The trial court explained why it did so. (See Appendix to Langenderfer's Petition in No. 84-508, A44.) The trial court thought it was given license to do so by *International Salt Co. v. United States* (1947), 332 U.S. 392, 400. The sentence the court relied upon was this:

"'it is not necessary that all of the untraveled roads * * * be left open and that only the worn one be closed.'" (Appendix to Langenderfer Petition in No. 84-508, A44.)

The difficulty here is that, as the trial court found, "There was no hard evidence at trial establishing that defendants had actually engaged in these specific practices." (Appendix to Langenderfer Petition in No. 84-508, A44.)

The trial court's error lay in granting an injunction telling Johnson, in effect, that, although it had not violated the law, it must not do so in the future. A district court "may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws," as the Court held in *International Salt*, 332 U.S. at 400, and other cases.

Langenderfer's real complaint on the trial, and now, concerns Johnson's (p.14) "ability to underbid everybody else's costs by 5% to 10% * * *."

Langenderfer's solution is in this sentence (p.15):

> "Why did Johnson year after year 'leave money on the table' when it could have won the jobs anyway by bidding at least 5% higher?"

Does that make sense?

CONCLUSION

The Court should end this wasteful litigation—now.

The Court should grant summary judgment.

No one could complain.

Both parties have asked the Court to do so.

Recall the wisdom of Judge Learned Hand, who, in *United States v. Aluminum Co. of America* (2d Cir. 1945), 148 F.2d 416, put it this way (p.430):

> "The successful competitor, having been urged to compete, must not be turned upon when he wins."

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